No. 91-1754

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ILLINOIS,

Petitioner,

vs.

GEOFFREY FREEMAN,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District, Third Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a *Batson* hearing on alleged racial discrimination in jury selection must be a full-scale trial, with discovery, subpoenas, testimony under oath and cross-examination.

Whether the ruling of the Illinois Appellate Court here, turning a *Batson* hearing into a full-scale trial, is in conflict with the rulings of other state and federal courts which have considered the issue.

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PETITION FOR WRIT OF CERTIORARI

To The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

May It Please The Court:

Petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First Judicial District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois is published as *People v. Freeman*, 220 Ill.App.3d 825, 163 Ill. Dec. 342, 581 N.E.2d 293 (1st Dist. 1991). That opinion appears as an Appendix to this Petition, as does the order of the Illinois Supreme Court denying leave to appeal

from that decision. *People v. Geoffrey Freeman* (Ill. Sup. Ct., No. 72829, unpublished order, Feb. 5, 1992).

There have been two other opinions by reviewing courts in this matter. The first was the initial decision of the Illinois Appellate Court in respondent's appeal from his murder conviction, that decision being published as *People v. Freeman*, 162 Ill.App.3d 1080, 114 Ill.Dec. 285, 516 N.E.2d 440 (1st Dist. 1987). The second is a short, unpublished supervisory order by the Illinois Supreme Court. *People v. ex rel. Daley v. Moran* (Ill. Sup. Ct., No. 67180, unpublished supervisory order, May 26, 1989). Both opinions are given as Appendices to this Petition.

HISTORY IN THE ILLINOIS REVIEWING COURTS

The decision of the Appellate Court of Illinois, First Judicial District in this matter was entered on October 9, 1991. *People v. Freeman*, 220 Ill.App.3d 825, 581 N.E. 2d 293 (1st Dist. 1991). The State filed a timely petition for leave to appeal in the Illinois Supreme Court, which was denied February 5, 1992. See Ill. Sup. Ct. Rule 315, Ill. Rev. Stat. 1991, Ch. 110A, sec. 315. This Petition is filed within 90 days of denial of leave to appeal by the Illinois Supreme Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). In this case there has been a final judgment on an issue of federal constitutional law, namely the procedural requirements for a *Batson* hearing on alleged racial discrimination in the use of peremptory challenges during jury selection. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

There has been a final judgment subject to review by this Court because the Illinois Appellate Court has resolved the federal constitutional issue, that being whether a *Batson* hearing must have the procedural characteristics of a full-scale trial. Moreover, unless the lower court decision is reviewed now it cannot be reviewed at all, since a full-scale trial on the *Batson* issue will take place unless this Court grants review. When a state reviewing court has decided a federal constitutional issue, and that issue will escape review by this Court unless certiorari is promptly granted, then this Court has jurisdiction even when there is an entire trial yet to take place in the state courts. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Moreover, it is conclusively presumed that the decision of the Illinois Appellate Court was based on federal constitutional law. When a state reviewing Court has considered a federal constitutional question, then it is assumed that it has based its decision on the United States Constitution unless the opinion contains a "plain statement" that the decision is based on state law. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The opinion of the Illinois Appellate Court in this case contains no statement, plain or otherwise, suggesting that it is based on any independent state law grounds. That opinion applied this Court's *Batson* decision, which in turn applied the Equal Protection Clause. Therefore this Court has jurisdiction to review the Illinois Appellate Court's ruling on a federal constitutional issue.

The question of jurisdiction is discussed further in Section III of the Reasons for Granting the Writ.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, section 1:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 22, 1981 Respondent Geoffrey Freeman shot 71 year old Madeline Mullenix to death and stole her Ford Thunderbird. At a jury trial in the Circuit Court of Cook County, Illinois respondent was convicted of murder and armed robbery. As it happened, the racial composition of the jury exactly matched the racial makeup of Cook County. Three of the twelve jurors were African-Americans and in addition there was one black alternate. (R. 2887, 2897) According to the 1980 Census, Cook County was 25 percent black. See *People v. Freeman*, 162 Ill.App.3d 1080, 1093, 516 N.E.2d 440, 448 (1st Dist. 1987). Nevertheless, the past decade has been spent litigating the racial makeup of the jury.

Most recently, the Illinois Appellate Court has ordered that this case be sent back to the trial court for a second *Batson* hearing on whether the State used its peremptory challenges to exclude black people from the jury. *People v. Freeman*, 220 Ill.App.3d 825, 581 N.E.2d 293 (1st Dist. 1991); See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Petitioner does not question the order requiring a second *Batson* hearing. However, petitioner does seek review of the directions that the *Batson* hearing be a full-scale trial, with discovery, subpoenas, testimony under oath from witnesses including the prospective jurors and cross-examination of those witnesses.

The facts of the murder and armed robbery may be found in the state trial record and in the prior published

opinions in this case. *People v. Freeman*, 162 Ill.App.3d 1080, 516 N.E.2d 440 (1st Dist. 1987); See also *People v. Burke*, 164 Ill.App.3d 889, 518 N.E.2d 372 (1st Dist. 1987). In summary, on January 22, 1981 71 year old Madeline Mullenix disappeared while driving to her home in Blue Island, a suburb of Chicago. Her two sons searched for her and found her automobile, but with a license-applied-for sticker in the window with Respondent Geoffrey Freeman's name on it. Respondent was arrested and led the police to Mrs. Mullenix's body. Later respondent dictated a confession to an assistant state's attorney and a court reporter. In his confession respondent admitted that he had staged an accident in order to steal Mrs. Mullennix's car. After Mrs. Mullennix stopped, respondent shot her twice, took her car and dumped her body in a vacant lot.

As noted, the jury selected to try respondent included three black jurors and one black alternate. That jury found respondent guilty of murder and armed robbery, and he was sentenced to life imprisonment.

On appeal respondent claimed that the State had discriminated in its use of peremptory challenges during jury selection, since 12 of the State's first 17 peremptories had been used against black members of the venire. The State responded that many of those prospective jurors had been excused either because they gave unsatisfactory answers to questions about the death penalty or because they had previously been arrested or charged in criminal matters. While this case was pending in the first appeal, this Court decided *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Complying with *Batson*, the Illinois Appellate Court remanded this case to the trial court for a hearing on whether there was racial discrimination in the State's use of peremptory challenges. *People v. Freeman*, 162 Ill.App.3d 1080, 516 N.E.2d 440 (1st Dist. 1987).

When the case got back to the trial court it was assigned to a new judge, who ordered that the trial prosecutors be placed under oath and be subject to cross-examination when explaining their reasons for peremptory challenges against black prospective jurors. The State sought a supervisory order from the Illinois Supreme Court, arguing that trial prosecutors are not required to be placed under oath and to be subject to cross-examination during a *Batson* hearing. The Illinois Supreme Court agreed with the State, and the trial judge's order requiring testimony under oath from the prosecutors at the *Batson* hearing was vacated. *People v. ex rel. Daley v. Moran* (Ill. Sup. Ct., No. 67180, unpublished supervisory order, May 26, 1989) (See Appendix C).

When the case got back to the trial court for the third time, respondent filed numerous interrogatories and requests for production of documents. Also, respondent requested that he be allowed to call witnesses to testify under oath in rebuttal at the *Batson* hearing to impeach the reasons given by the trial prosecutors for their peremptory challenges. The principal witnesses respondent intended to call were the prospective jurors who had been excused by the State at the trial. The judge denied both the request for discovery and the request to call the prospective jurors as witnesses. (R. 2965-66, 2968-69)

Then trial prosecutor Ray Garza explained each of the 13 peremptory challenges he had exercised against black prospective jurors at trial. (R. 2930-54) The judge complained that, because the Illinois Supreme Court had refused to require that Garza testify under oath, the judge was unable to rule on Garza's credibility. (R. 2966-67) However, the judge found that Garza had given racially neutral explanations for the State's use of its peremptory challenges, and that those explanations were supported

by the trial notes of the prosecutors. (R. 2967-68) Therefore the judge ruled in favor of the State at the *Batson* hearing and denied the motion for new trial.

On appeal the Illinois Appellate Court decided that, because the judge said he was unable to rule on the trial prosecutor's credibility, another *Batson* hearing was necessary. *People v. Freeman*, 220 Ill.App.3d 825, 581 N.E.2d 342 (1st Dist. 1991). That ruling is not challenged in this Petition. However, the Illinois Appellate Court also held that at the second *Batson* hearing respondent was entitled to seek discovery and to call witnesses, including the excluded jurors, to respond to the prosecutor's explanation of his peremptory challenges. Petitioner seeks review of the ruling that discovery and testimony under oath by witnesses are proper at a *Batson* hearing.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE ILLINOIS APPELLATE COURT HERE, TO THE EFFECT THAT A *BATSON* HEARING MUST BE A FULL-SCALE TRIAL, CONFLICTS WITH THIS COURT'S DECISIONS ON THE PROCEDURAL REQUIREMENTS FOR A *BATSON* HEARING.

The Illinois Appellate Court ruled in this case that a *Batson* hearing on alleged racial discrimination during jury selection must be a full-scale trial, with discovery, subpoenas, testimony under oath and cross-examination. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). That decision conflicts with the rulings of this Court saying that a *Batson* hearing should be a short and simple proceeding which does not disrupt the normal jury selection process. *Hernandez v. New York*, ____ U.S.

____, 111 S.Ct. 1859, 1865-66, 114 L.Ed.2d 395, 405 (1991). To resolve this conflict, this Court should grant certiorari.

Moreover, the procedure that must be used at a *Batson* hearing is an important legal question which has not yet been fully considered by this Court. Lower courts, both state and federal, are in hopeless conflict on this issue. (See Section II) In the 1986 *Batson* decision this Court required trial courts to hold hearings on whether prosecutors had discriminated during jury selection in their use of peremptory challenges. However, at that time this Court deliberately refused to decide whether a *Batson* hearing includes things such as evidence from the defense, witnesses testifying under oath and cross-examination. 476 U.S. at 99 n.24, 106 S.Ct. at 1725 n.24. However, the lower state and federal courts have been unable to define a *Batson* hearing. The time has come for this Court to tell those lower courts what a *Batson* hearing is.

The Appellate Court of Illinois ruled in this case that a *Batson* hearing is a full-scale trial, with pretrial discovery and testimony under oath from defense witnesses. (App. A, pp. 6a-9a) The right to call witnesses to testify under oath, of course, means that those witnesses may be subpoenaed into court and may be cross-examined. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); U.S. Const., Amend. VI. Most important of all is the fact that under the Illinois Appellate Court's opinion a *Batson* hearing may not be part of the jury selection process, but must be a separate trial in and of itself. Like all trials, the Illinois Appellate Court's version of a *Batson* hearing would be preceded by weeks or months of time for discovery and subpoenaing witnesses into court. Thus, under the Illinois Appellate Court's version of a *Batson* hearing, whenever a judge orders such a hearing the underlying criminal trial must be recessed

and a separate trial scheduled on alleged discrimination in jury selection.

This ruling by the Appellate Court of Illinois is in direct conflict with this Court's definition of a *Batson* hearing. *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *Powers v. Ohio*, ____ U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986). This Court has not said much about the procedure for a *Batson* hearing, but it has said enough to show that a *Batson* hearing is not a full-scale trial. Instead, a hearing on alleged discrimination in the use of peremptory challenges is a short, simple, three-stage process which takes place in the middle of jury selection in a criminal case.

In the recent *Hernandez* case this Court gave the following definition of a *Batson* hearing:

> In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. The analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859, 1865-66, 114 L.Ed.2d 395, 405 (1991). (Citations omitted)

Thus, according to this Court, the three stages of a *Batson* hearing do not involve discovery, subpoenas, testi-

mony under oath by defense witnesses or cross-examination. Moreover, a *Batson* hearing must take place "without any substantial disruption of the jury selection process."

Likewise, in the *Powers* case this court ruled that, while it is for trial courts to choose procedures to implement *Batson*, those procedures should not disrupt jury selection in a criminal case. *Powers v. Ohio*, ____ U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). This Court said: "It remains for the trial courts to develop rules, *without unnecessary disruption of the jury selection process*, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." 111 S.Ct. at 1374, 113 L.Ed.2d at 429 (Emphasis added).

Indeed, in the *Batson* decision itself this Court outlined a procedure which made it clear that a *Batson* hearing is not a full-scale trial. This Court said:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination. *Batson v. Kentucky*, 476 U.S. 79, 97-98, 106 S.Ct. 1712, 1723-24, 90 L.Ed.2d 69, 88-9 (1986).

Thus, according to this Court, the three stages of a *Batson* hearing are (1) the defendant makes out a prima facie case, (2) the prosecutor responds with non-racial explanations for his peremptory challenges and (3) the judge rules. There is no place in this short and simple procedure for discovery, subpoenas, testimony under oath by defense witnesses or cross-examination.

Therefore, the Appellate Court of Illinois violated the law as defined by this Court when it turned a *Batson* hearing into a full-scale trial. According to the Illinois Appellate Court, a *Batson* hearing involves at least five stages: (1) the defendant makes out a prima facie case, (2) the trial court adjourns for pretrial discovery and to subpoena witnesses, (3) the prosecutor states non-racial reasons for his challenges, (4) the defense responds by calling witnesses to testify and be cross-examined and (5) the court rules. Obviously such a procedure could not take place during jury selection in a criminal case, but would be a separate trial which would take weeks or months to prepare and complete.

The Appellate Court of Illinois has indicated that practically anything can go into evidence at a *Batson* hearing. That court's opinion allows discovery of office training manuals or internal policy statements of the State's Attorneys Office, although those documents would not even mention respondent's case. (App. A, pp. 6a-7a) Under that ruling respondent has demanded the production of thousands of different documents, including every document ever produced by the Cook County State's Attorney's Office which even mentions the *Batson* decision. (See Appendix E: Defendant Geoffrey Freeman's Request for Production of Documents, para. 5) Also, the Illinois Appellate Court has ruled that respondent may subpoena the excluded jurors from his trial into court and offer their testimony at the second *Batson* hearing. (App. A, pp. 7a-9a) It is not clear how testimony by members of the jury panel would be helpful at a *Batson* hearing, but it is clear that forcing prospective jurors to testify would disrupt the jury selection process. The Illinois Appellate Court should not have reversed the decision of the trial court

judge refusing to allow discovery or to allow testimony by prospective jurors at the *Batson* hearing.

Of course, state courts must have great flexibility in choosing the procedures for *Batson* hearings, but that flexibility does not include the right to overrule the language and policy of this Court's decisions. Also, a state court applying state law may of course give greater procedural rights to a criminal defendant than those required by the United States Constitution. *Illinois v. Gates*, 462 U.S. 213, 221-22, 103 S.Ct. 2317, 2323, 76 L.Ed. 527, 537-38 (1983). However, the decision of the Illinois Appellate Court in respondent's case rests solely on the *Batson* decision and on Illinois precedents applying *Batson*, and there is no hint of any independent state law grounds in that court's opinion. (See Section III) Since the Appellate Court of Illinois applied federal constitutional law erroneously on an important question, its decision should be reviewed by this Court.

Of course, if the decision of the Illinois Appellate Court in this case stands, petitioner will argue that it is a bizarre aberration limited to the facts of this particular case. Unfortunately, however, there is no explicit language in that court's opinion which would limit the holding to a case in which a *Batson* hearing takes place nearly a decade after the trial.

In conclusion, this Court has held that a *Batson* hearing is a short and simple process which takes place during jury selection in a criminal case. The Illinois Appellate Court, on the other hand, has indicated that a *Batson* hearing is a full-scale trial which requires weeks or months of preparation. Since the opinion of the Illinois Appellate Court conflicts with the language and policy of this Court's opinions, certiorari should be granted.

II.

THE VARIOUS STATE AND FEDERAL DECISIONS ATTEMPTING TO DEFINE A *BATSON* HEARING ARE IN HOPELESS CONFLICT, A CONFLICT WHICH SHOULD BE RESOLVED BY THIS COURT.

The lower state and federal courts have been unable to decide what a *Batson* hearing is. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). They are in hopeless conflict on the question of what kind of inquiry the constitution requires a trial judge to make when there is a claim of racial discrimination in the use of peremptory challenges. Those courts are divided on such basic questions as (1) whether *Batson* requires an evidentiary hearing, (2) whether defense counsel even has a right to be present when the State explains its peremptory challenges, (3) whether a defendant has a right to call witnesses to rebut the State's explanations, (4) whether a defendant has a right to cross-examine a prosecutor about those explanations, and (5) whether the State's notes on jury selection must be turned over to the defense. While flexibility is desirable on this procedural question, anarchy is not. This Court should tell the lower state and federal courts what they have to do to comply with the *Batson* decision.

Most federal courts which have considered the question have decided that *Batson* does not require an evidentiary hearing in a trial court. *United States v. Lane*, 866 F.2d 103, 107 (4th Cir. 1989) (no "evidentiary hearing" required); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988), *cert. den.*, 488 U.S. 996 (no evidentiary hearing required "in which prosecutors and defense attorneys and possibly other witnesses would be examined and cross-examined. . . ."); *United States v. Tindle*, 860 F.2d 125, 131 (4th Cir. 1988), *cert. den.*, 490 U.S. 1114 (no "trial

within a trial" necessary); *United States v. Clemons*, 941 F.2d 321, 324 (5th Cir. 1991) (no "full blown mini trial" required). The majority rule on *Batson* hearings was stated by the Eighth Circuit in *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989), *cert. den.*, 490 U.S. 1028:

> Essentially, is the judge required to hold an evidentiary hearing or some sort of mini-trial on the merits of the claim?
>
> On the whole, we think not.

But, as discussed below, this majority rule conflicts with decisions giving defendants the right to call witnesses at a *Batson* hearing. See, e.g., *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), *cert. dis.*, 487 U.S. 1265; *State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989).

Moreover, some federal circuits have held that a *Batson* hearing is not an adversary proceeding at all and therefore defense counsel may be excluded when the prosecution explains the use of peremptory challenges against minority jurors. *United States v. Davis*, 809 F.2d 1194 (6th Cir. 1987), *cert. den.*, 483 U.S. 1007; *United States v. Tucker*, 836 F.2d 334 (7th Cir. 1988), *cert. den.*, 490 U.S. 1105. *Davis* and *Tucker* hold that a defense attorney has nothing to do or say when a prosecutor explains his use of peremptory challenges, so such explanations may be given *in camera* with the defendant and his attorney excluded. Obviously, if a defendant has no right to even hear the prosecution's reasons for its challenges, then the defendant has no right to offer evidence or even argument in response. In addition, the Fourth Circuit has allowed a prosecutor at a *Batson* hearing to offer his notes on jury selection to the trial judge *in camera* without turning those notes over to the defendant. *United States*

v. Garrison, 849 F.2d 103 (4th Cir. 1988), *cert. den.*, 488 U.S. 996; *United States v. Tindle*, 860 F.2d 125 (4th Cir. 1988), *cert. den.*, 490 U.S. 1114. On the other hand, the Ninth Circuit has explicitly rejected the Sixth Circuit's *Davis* decision and has held that a *Batson* hearing is an adversary proceeding from which defense counsel may not be excluded. *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). After the *Thompson* decision was handed down, the Seventh Circuit explicitly refused to follow the Ninth Circuit's decision in *Thompson* and instead decided to follow the Sixth Circuit's decision in *Davis*. *United States v. Tucker*, 836 F.2d 334, 338-40 (7th Cir. 1988), *cert. den.*, 490 U.S. 1105. This explicit and acknowledged conflict in circuits on whether a *Batson* hearing is an adversary proceeding justifies a grant of certiorari. U.S. Sup. Ct. Rule 10.1(a).

On the other hand, there are a number of cases holding that a defendant has the right to present evidence at a *Batson* hearing. *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), *cert. dis.*, 487 U.S. 1265; *Ex parte Branch*, 526 So.2d 609, 624 (Ala. 1987); *State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989); *Williams v. State*, 767 S.W.2d 872 (Tex. App. 1989). Texas goes further than any other state in turning a *Batson* hearing into a complete trial, requiring that a *Batson* hearing take place in open court, with cross-examination of the prosecutor and discovery of the prosecutor's notes on jury selection. *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990). Obviously, each of these cases is in direct conflict with the precedents holding that *Batson* does not require an evidentiary hearing. For example, in the *Gordon* case the Eleventh Circuit vacated a conviction and remanded for a new *Batson* hearing because the defendant had not been allowed to offer evidence to rebut the government's reasons for

its peremptory challenges. *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), *cert. dis.*, 487 U.S. 1265; See also *United States v. Alston*, 895 F.2d 1362, 1373-5 (11th Cir. 1990) (Hatchett J., Concurring). *Gordon* is in direct conflict with the decisions of the Fourth, Fifth, Sixth, Seventh and Eighth Circuits holding that an evidentiary hearing is not required by *Batson*. *United States v. Garrison*, 849 F.2d 103 (4th Cir. 1988), *cert. den.*, 488 U.S. 996; *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991); *United States v. Davis*, 809 F.2d 1194 (6th Cir. 1987), *cert. den.*, 483 U.S. 1007; *United States v. Tucker*, 836 F.2d 334 (7th Cir. 1988), *cert. den.*, 488 U.S. 855; *United States v. Roan Eagle*, 867 F.2d 436 (8th Cir. 1989), *cert. den.*, 490 U.S. 1028. Again, this clear conflict of circuits justifies a grant of certiorari by this Court.

There are other conflicts in lower court decisions attempting to define a *Batson* hearing. For example, some courts say that the defense has a right to cross-examine a prosecutor after the prosecutor has given his non-racial reasons for the use of his peremptory challenges. *Thomas v. Diversified Contractors*, 578 So.2d 1254 (Ala. 1991); *Ex parte Lynn*, 543 So.2d 709 (Ala. 1988), *cert. den.*, 110 S.Ct. 351; *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990). However, the majority rule is that a prosecutor need not be placed under oath or be subject to cross-examination at a *Batson* hearing. *Powell v. State*, 187 Ga. App. 878, 372 S.E.2d 234 (1988); *Gray v. State*, 317 Md. 250, 562 A.2d 1278 (1989); *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990). As noted in the opinion of the Illinois Appellate Court in this case, Illinois follows the rule that a prosecutor at a *Batson* hearing is not subject to cross-examination. *People v. Mack*, 128 Ill.2d 231, 538 N.E.2d 1107 (1989), *cert. den.*, 110 S.Ct. 1170; *People v. Young*, 128 Ill.2d 1, 538 N.E.2d 453 (1989), *cert. den.*, 110

S.Ct. 3290. However, the conflict in state court decisions on this point would make it appropriate for this Court to decide whether a defendant at a *Batson* hearing has the right to cross-examine a prosecutor explaining his peremptory challenges.

There is also a conflict of authority on whether a defendant is entitled to discovery of documents from the prosecution before a *Batson* hearing. The question is important, because if a defendant is entitled to discovery then he would ordinarily be entitled to have his criminal trial adjourned until discovery is completed. The Fourth Circuit has decided that a defendant at a *Batson* hearing is not entitled to discovery of the prosecutor's notes on jury selection, even when those notes were given to the District Judge for an *in camera* inspection. *United States v. Garrison*, 849 F.2d 103 (4th Cir. 1988), *cert. den.*, 488 U.S. 996; *United States v. Tindle*, 860 F.2d 125 (4th Cir. 1988), *cert. den.*, 490 U.S. 1114. The Missouri Supreme Court has also ruled that notes on jury selection are not subject to discovery. *State v. Antwine*, 743 S.W.2d 51 (Mo. 1987), *cert. den.*, 486 U.S. 1017. On the other hand, the Texas Court of Criminal Appeals has ruled that a prosecutor's notes on jury selection must be turned over at a *Batson* hearing. *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990). However, the Illinois Appellate Court in this case has gone further than any other court in ordering discovery for a *Batson* hearing of documents like office training manuals. (App. A, pp. 6a-7a) Pursuant to that ruling, respondent has filed a discovery demand similar to those used in complex civil litigation. (App. E: Defendant Geoffrey Freeman's Request for Production of Documents) This Court should remind lower courts that a *Batson* hearing should take place "without substantial disruption of the jury selection process" and that a long con-

tinuance to prepare for a *Batson* hearing is not required as a matter of constitutional law. *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 405 (1991).

Thus lower court decisions outlining the procedure for a *Batson* hearing are in hopeless conflict. Some courts have held that a defendant has no right to present evidence at a *Batson* hearing, while others have held that a *Batson* hearing is like a full-scale trial. This failure to define a *Batson* hearing has been the subject of scholarly discussion. Kavanaugh, Defense Presence and Participation: A Procedural Minimum for *Batson v. Kentucky Hearings*, 99 Yale L.J. 187 (1989); Raphael, Discriminatory Jury Selection: Lower Court Implementation of *Batson v. Kentucky*, 25 Willamette L. Rev. 293, 335-38 (1989); Alshuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 University of Chicago L. Rev. 153, 170-211 (1989). This Court should grant certiorari to resolve the conflicting lower court decisions.

The Appellate Court of Illinois in this case has ruled in effect that a *Batson* hearing is like a full-scale trial. The trial court judge ruled against discovery and testimony by excluded jurors, but the Illinois Appellate Court reversed those rulings. The decision of the Appellate Court of Illinois approves extensive discovery before the *Batson* hearing and allows respondent to call the excluded jurors as witnesses, a decision which also implies that the excluded jurors may be subpoenaed into court and may be cross-examined. While such procedural rights could be granted to a criminal defendant under state law, the Appellate Court of Illinois was wrong to base its ruling on the *Batson* decision. The Illinois Appellate Court's decision, to the effect that a *Batson* hearing is a full-scale

trial, is a ruling which is in conflict with many state and federal reviewing court decisions. Certiorari should be granted to resolve those conflicting interpretations of this Court's decision in *Batson*.

III.

THIS COURT HAS JURISDICTION HERE BECAUSE THERE HAS BEEN A FINAL JUDGMENT ON A FEDERAL CONSTITUTIONAL ISSUE AND BECAUSE THAT DECISION WILL NOT BE SUBJECT TO REVIEW BY THIS COURT AT ANY LATER TIME.

The Appellate Court of Illinois reached a final judgment on a federal constitutional issue, and that decision must be reviewed now if it is ever to be reviewed in this case. This Court has jurisdiction over final judgments on federal constitutional issues even when further proceedings, including entire trials, are scheduled to take place in state court. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The federal constitutional issue decided by the Illinois Appellate Court was whether a *Batson* hearing has the procedural characteristics of a full-scale trial. That ruling must be treated as a federal constitutional decision because there is no "plain statement" in the Illinois Appellate Court's opinion saying that its ruling was based on state law grounds. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Therefore, since there has been a final decision on a federal constitutional issue, this Court has jurisdiction to review the case.

In this case the Appellate Court of Illinois has handed down a ruling indicating that discovery, subpoenas, testimony under oath and cross-examination are part of a *Batson* hearing. Although the hearing is yet to take place, the Illinois Appellate Court's ruling on the procedural re-

quirements for such a hearing is final in the sense that it will never be subject to review by this Court again. The Appellate Court's ruling about the procedure for a *Batson* hearing is to be implemented immediately, and once the hearing takes place this Court will have no further chances to review that ruling. Once discovery has taken place, once the excluded jurors have been subpoenaed into court, once they have testified under oath and once they have been cross-examined, this court will not be able to decide whether those procedures were required by *Batson*. Since the Illinois Appellate Court's procedural rulings are to be applied immediately, and will not be reviewed in further appeals, those rulings are final judgments which may be reviewed by this Court.

The procedural issues decided by the Illinois Appellate Court can never again be raised on appeal by either the State or respondent. When the case gets back to the trial court for a second *Batson* hearing, the state trial judge either will or will not grant respondent a new trial. If respondent is given a new trial, then under Illinois law the State has no right to appeal that ruling. Ill. Sup. Ct. Rule 604(a)(1), Ill. Rev. Stat. 1991, Ch. 110A, sec. 604(a)(1); See *People v. Barry*, 202 Ill.App.3d 212, 215, 559 N.E.2d 919, 921 (1st Dist. 1990). If respondent is denied a new trial, then he may appeal but will certainly not raise as an issue any procedural question which was decided in his favor in a prior appeal. Moreover, if a new trial is granted it will result in either a conviction or in an acquittal. The State cannot appeal an acquittal and will not appeal a conviction. Ill. Const. Art. VI, § 6. Respondent could appeal a conviction, but in such an appeal certainly would not question the order granting him a new trial in the first place. Thus, whatever happens in the state trial court, the State will never be able to appeal and

respondent will never have any reason to appeal on the procedural issues decided in his favor by the Illinois Appellate Court. Therefore the state reviewing court, when it decided on the procedure to be used at a *Batson* hearing, reached a final judgment on an issue of federal constitutional law.

When there has been a final judgment in state court on a federal constitutional question, and that judgment will not be subject to review in a later appeal, then this Court has jurisdiction even when extensive further proceedings are contemplated in state court. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). For example, in *Pennsylvania v. Ritchie* this Court decided, before any trial had taken place in a criminal case, whether the defendant was entitled to receive a confidential social work report during pretrial discovery. Obviously there had been no final judgment under state law, since the trial was yet to take place. But, because the federal constitutional issue had been decided and would be moot in any later appeal, this Court ruled that it had jurisdiction over the case.

For exactly the same reasons, this Court has jurisdiction here. The Appellate Court of Illinois has made its rulings on the procedural requirements for a *Batson* hearing. Those rulings will be implemented as soon as the case gets back to the trial court, and they will be not be subject to review in any later appeal. Therefore, as in the *Ritchie*, *Cox* and *Mills* cases, there has been a final judgment on the federal constitutional issue in question, although there is a trial or hearing yet to take place in state court. Accordingly, this Court has jurisdiction to review

that final judgment on the federal constitutional issue. 28 U.S.C. § 1257(3).

Moreover, under the law as stated by this Court it is conclusively presumed that the ruling of the Illinois Appellate Court is based on federal constitutional law rather than on any state law grounds. *Illinois v. Rodriguez*, ____ U.S. ____, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Under *Rodriguez* and *Long* a state court decision on a constitutional question is presumed to be based on federal constitutional grounds unless there is a "plain statement" that the decision is based on state law. The Illinois Appellate Court's decision here applies this Court's *Batson* decision, and thus is based on federal constitutional requirements. That court's opinion contains no "plain statement," and indeed no statement at all, suggesting that it is based on any independent state law grounds. Therefore, this Court has jurisdiction to review the Illinois Appellate Court's interpretation of the *Batson* decision.

The Appellate Court of Illinois, when ruling on the procedure to be followed at the pending *Batson* hearing, cites only *Batson* itself and two Illinois Supreme Court decisions applying *Batson*. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *People v. Harris*, 129 Ill.2d 123, 544 N.E.2d 357 (1989), *cert. den.*, 110 S.Ct. 1323; *People v. Young*, 128 Ill.2d 1, 538 N.E.2d 453 (1989), *cert. den.*, 110 S.Ct. 3290. When discussing the procedure to be used at *Batson* hearings, the Illinois Appellate Court's opinion in this case does not rely upon or even mention any Illinois rule, statute or constitutional provision. Likewise, the *Harris* and *Young* decisions, cited by the Illinois Appellate Court, are based solely on *Batson* and not on any Illinois rule of law. Therefore, under the "plain statement" rule, this Court has jurisdiction over

the Illinois Appellate Court's ruling on the procedure to be followed at *Batson* hearings.

Applying the "plain statement" rule, this Court said in *Illinois v. Rodriguez*, ____ U.S. ____, 110 S.Ct. 2793, 2798, 111 L.Ed.2d 148, 157 (1990):

> Here, the Appellate Court's opinion contains no "plain statement" that its decision rests on state law. The opinion does not rely upon (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution. We conclude that the Appellate Court of Illinois rested its decision on federal law.

For the same reasons, this Court should conclude that the decision of the Appellate Court of Illinois here was based on federal constitutional law.

Here, although the second *Batson* hearing is yet to take place, there has been a final judgment on the procedure to be used at that hearing. The decision of the Appellate Court of Illinois on that issue will be applied now and will not be subject to review by this Court in any later appeal. Thus there has been a final judgment on the federal constitutional issue in this case, although further proceedings are contemplated in state court. Under those circumstances this Court has jurisdiction. Moreover, the decision of the Appellate Court of Illinois implements this Court's *Batson* decision, and there is no statement, plain or otherwise, that the decision is based on any rule of state law. Since there has been a final judgment on a federal constitutional issue, this Court has jurisdiction to issue a writ of certiorari in this case.

CONCLUSION

Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion issued in this matter by the Appellate Court of Illinois, First Judicial District.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion Of The Appellate Court Of Illinois, First Judicial District, Published As *People v. Freeman*, 220 Ill. App. 3d 825, 581 N.E.2d 342 (1st Dist. 1991)

THIRD DIVISION — October 9, 1991

NOS. 1-89-2414; 1-89-2500; Cons.

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

GEOFFREY FREEMAN,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Matthew J. Moran, Judge Presiding.

JUSTICE GREIMAN delivered the opinion of the court:

Defendant, Geoffrey Freeman, was convicted of the murder and armed robbery of 71-year-old Madeline Mullenix and was sentenced to natural life imprisonment. This court upheld the jury conviction (*People v. Freeman* (1987), 162 Ill. App. 3d 1080, 560 N.E.2d 440 (hereinafter *Freeman I*)), but found *prima facie* discrimination by the prosecution's exercise of peremptory challenges during jury selection and remanded the matter to the circuit court of Cook County for a *Batson* hearing. *Batson v. Kentucky* (1986), 476 U.S. 79, 93, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

The judge who presided over the trial died shortly thereafter and the *Batson* hearing was assigned to another judge (hereinafter the "hearing judge").

At the *Batson* hearing, the hearing judge found the State provided racially neutral explanations for the exclusion of the 13 jurors in question and affirmed the conviction.

For the reasons set forth below, this matter is remanded to the trial court for a new *Batson* hearing.

In *Freeman I* when we remanded the case for a *Batson* hearing, we gave the State an opportunity to come forward with neutral explanations for the exclusion of certain black prospective jurors and we said:

> "If the trial court decides that the State has come forward with a neutral explanation for the exercise of its peremptory challenges excluding the black prospective jurors, and the neutral explanation is sufficient to rebut defendant's *prima facie* case of purposeful racial discrimination, then defendant's conviction will stand." *Freeman*, 162 Ill. App. 3d at 1094.

At the commencement of the *Batson* hearing, the hearing judge ruled that all witnesses at the *Batson* hearing, including the trial prosecutors, would be placed under oath and subject to cross-examination and determined that a mere statement by the trial prosecutors would not overcome the *prima facie* discrimination determined by us in *Freeman I.*

Immediately thereafter, July 16, 1988, the State filed a motion for a supervisory order in the Illinois Supreme Court requesting that the hearing judge's requirements of testimony under oath by the prosecutor be vacated. *People v. Freeman*, (Ill. Sup. Ct. May 26, 1989), No. 67180, unpublished supervisory order.[1]

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[1] The Illinois Supreme Court initially denied the State's motion for a supervisory order on August 19, 1988, but vacated that order on August 25, 1988, on its own motion and continued the State's motion.

The unpublished supervisory order of May 26, 1989, obviated the requirement of the prosecutors being sworn and subject to cross-examination regarding their use of peremptory challenges. The Illinois Supreme Court first decided this issue in *People v. Young* on February 22, 1989; the rehearing of that case being denied on May 26, 1989, the day the unpublished supervisory order in this case was issued. Given the narrow time frame, it is understandable that the hearing judge may not have been completely familiar with the case. The supervisory order might be considered the precursor of later Supreme Court cases which make it clear that prosecutors would not be under oath and subject to cross-examination. *People v. Hope* (1990), 137 Ill. 2d 430, 560 N.E.2d 849; *People v. Mack* (1989), 128 Ill. 2d 231, 538 N.E.2d 1107; *People v. Young* (1989), 128 Ill. 2d 1, 538 N.E.2d 453, *reh'g denied* May 26, 1989.

The Illinois Supreme Court in *Young* observed that the U.S. Supreme Court in *Batson* refrained from making prosecutors witnesses in a trial-within-a-trial. *Batson* left the specific procedures for conducting a hearing to State courts.

Since that time, Illinois has provided an even more restrictive setting for *Batson* hearings. (*Hope*, 137 Ill. 2d 430.) Criminal evidentiary procedures such as those set out in Supreme Court Rule 412 are not applied mandatorily to post-conviction *Batson* hearings. *Hope*, 137 Ill. 2d at 484.

At the *Batson* hearing, the prosecutor gave explanations for the exclusion of each of the 13 African-Americans excluded from the *Freeman I* jury. The prosecutor provided various explanations, some of which were duplicative with respect to these members of the venire.

After examination of the transcript of the hearing and the trial, the hearing judge concluded: "the record does not contain a reasonable explanation for the use of at least four of the [State's] peremptory challenges" and that "normally, the assessment of a witness's credibility, is essential to the fact-finding process. In this case the prosecutor was not a witness but an officer of the court and an advocate for his own cause."

The hearing judge went on to state "the court does not find [the prosecutor's] explanations to be truthful since he refused to take an oath and to be subject to cross-examination * * * the [s]upervisory [o]rder requires me to evaluate the unsworn statements of the prosecutor. But, in America trial judges are not commanded to believe anyone."

The trial court also believed that the supervisory order prohibited cross-examination of the trial prosecutors and the offering of rebuttal testimony and that he was required to accept the State's facially neutral explanations.

Thereafter, the trial court denied the defendant's motion for a new trial.

The hearing judge was required to sail on somewhat uncharted waters. The trial court had only the *Young* case as a guideline since *Hope* and *People v. Harris* (1989), 129 Ill. 2d 123, 544 N.E.2d 357, had yet to be decided. These cases would have been instructive for the hearing judge in determining the nature of the hearing over which he was about to preside.

At best it is difficult for a reviewing court to completely understand the nature of the hearing judge's ruling. On the one hand, he finds the State's explanations were not credible and that the State apparently did not bring forth sufficient evidence to establish appropriate explanations

for the peremptory challenges. On the other hand, the hearing judge ultimately concluded that he was required to accept the State's facially neutral *Batson* explanations as conclusive and declined to weigh the credibility of the State's witnesses in providing explanations.

The hearing judge observed that the prosecutor's *Batson* statement was "substantially supported" by the record but determined "that in view of the restrictions imposed by the supervisory order" he could not say whether he believed the prosecutor. From this, we can only conclude that the hearing judge provided an overly restrictive interpretation of the supervisory order of May 26, 1989.

This court recently held in *People v. Kindelan* (1st Dist. May 6, 1991), No. 88-1345, that the State's burden of proving neutrality is "grounded in [the] credibility" that the trial judge accords the prosecutor. The hearing judge in the case at bar found the statements were facially neutral as compared to the record, but did not find them "truthful" since the prosecutor declined to be sworn. It should be clear that *Kindelan* requires the hearing judge at a *Batson* hearing to weigh the credibility of the prosecutor. Requiring the prosecutor's oath ought not to be the cutting edge for this task.

Once a defendant has established a *prima facie* case of discrimination, the State has the burden of providing a race-neutral explanation for each peremptory challenge to which defendant objects. (*Batson*, 476 U.S. at 93.) The State's explanations must be clear, reasonably specific, legitimate and non-racial. (*Hope*, 137 Ill. 2d at 467.) They must be more than a mere assertion that the prosecution acted in good faith or without discriminatory motive. *Harris*, 129 Ill. 2d at 174.

The trial court must make a sincere and reasoned attempt to evaluate the State's explanations (*Hope*, 137 Ill.

2d at 467) and must assess the genuineness of the State's assertions to determine if they are legitimate and, in fact, race neutral. *People v. Baisten* (1990), 203 Ill. App. 3d 64, 77, 560 N.E.2d 1060.

Based on this record, we are unable to determine whether the hearing judge appropriately weighed the evidence in determining whether there was a *Batson* violation. Accordingly, we believe that the hearing judge should be afforded another opportunity to examine the *Batson* allegations and we will therefore remand this matter to the trial court for a new *Batson* hearing.

Three additional matters remain for our consideration: (i) defendant's right to propound interrogatories; (ii) defendant's right to the discovery of certain documents; and (iii) defendant's right to provide rebuttal testimony.

As to the first issue, we agree with the hearing judge's determination that the supervisory order of May 26, 1989, precluded the use of interrogatories directed at the State. Although the order is silent with respect to interrogatories, the spirit of the court's order seems clear and defendant ought not to be allowed to circumvent the prohibition against cross-examination by interrogation through interrogatories.

Illinois decisions have made it clear that the Illinois Supreme Court expects the *Batson* hearings to more closely follow the format of a preliminary hearing rather than a full-blown criminal trial. In *Mack*, the court rejected the notion of expanded trial procedures or procedural safeguards when the *Batson* hearing was held before a judge different than the trial judge. *Mack*, 128 Ill. 2d at 252.

As to the second issue, nothing in the supervisory order precludes initiation of reasonable discovery by the defendant. As in all cases, the court has control of that discov-

ery process and can determine the reasonableness of the request. If material contained in training manuals or policies of the State's Attorney would add to the court's finding of *prima facie* discrimination and increase the State's burden, the trial court should be able to consider such matters. It will assist in leading to a just result in ensuring that defendant had a fair trial by a jury appropriately selected.

Although *Mack* establishes the kinds of limitations the court wishes to impose on *Batson* hearings, it does not expressly rule upon the propriety of a discovery request. The defendant ought to be able to determine whether the questions asked of veniremen and the exercise of peremtory challenges are part of a scheme or a plan to limit the minority members of a jury before which defendant will be tried.

Mack did address the issue of discovery of the prosecutor's notes. Because a prosecutor's notes are protected from disclosure under the work-product doctrine unless they contain material favorable to the defense under *Brady v. Maryland* (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, the notes in *Mack* were inspected *in camera* by the hearing judge. The judge found that the notes did not contain material favorable to the defendant and denied the motion to compel production. (*Mack*, 128 Ill. 2d at 247.) Here, the hearing judge inspected the prosecutor's notes *in camera* and determined that the notes supported the prosecutors' explanations. The hearing judge concluded that there was no material favorable to defendant and that discovery of the notes should be denied. On that basis, we agree.

As to the third issue, defendant sought to introduce testimony of excluded jurors to rebut the State's explanations for its exercise of peremptory challenges. The hear-

ing judge excluded the rebuttal testimony of challenged jurors, stating that:

> "I think that [testimony] would go beyond the scope of the *Batson* decision. Particularly, since the Appellate Court has already found there is *prima facie* evidence of discrimination in the exclusion of these jurors. The Court will not permit excluded jurors to be called at this limited hearing."

Generally, a defendant should be afforded the opportunity to rebut the prosecutor's *Batson* explanations for the exercise of peremptory challenges. (*Harris,* 129 Ill. 2d at 177; *Young,* 128 Ill. 2d at 27.) It is the duty of the hearing judge to determine whether the State's explanations are race-neutral, and it is the judge's decision whether certain rebuttal testimony would be helpful to his determination.

In *Young,* the Illinois Supreme Court held that the trial court properly refused to admit rebuttal testimony of defendant and his trial counsel regarding a juror's responses since the hearing judge had also presided over the *voir dire* and had observed the demeanor of the prospective jurors directly. *Young,* 128 Ill. 2d at 27-28.

In *Harris,* the court clearly set out the format for a *Batson* hearing:

> "[I]n *Batson*, the court stated that once a defendant makes out a *prima facie* case of discrimination, the prosecutor need only 'articulate a neutral explanation related to the particular case to be tried.' *The defendant may then attempt to rebut the prosecution's explanation as being pretextual.* At the conclusion of the hearing, the trial court has the duty to weigh the evidence and 'determine if the defendant has established purposeful discrimination.' " [Emphasis Added.] *Harris,* 129 Ill. 2d at 177.

The court specifically authorizes rebuttal evidence by the defense and commands the hearing judge to carefully weigh the evidence. *Harris* does not limit the kind of rebuttal evidence which can be offered. In the instant case, the defendant sought to offer testimony of excluded jurors and under *Young* and *Harris*, a hearing judge may properly find their testimony helpful in determining whether the State's race-neutral explanations are pretextual. *Harris*, 129 Ill. 2d at 177; *Young*, 128 Ill. 2d at 27.

Accordingly, at the new *Batson* hearing the defendant shall be permitted to offer testimony of excluded jurors for the purpose of demonstrating that the State's race-neutral explanations are pretextual.

Finally, we reiterate the instruction given the trial court when we initially reviewed defendant's case in *Freeman I* and against direct that the trial court enter sentence on defendant's armed robbery conviction if the State prevails at a new *Batson* hearing. If the defendant prevails at the hearing, this defendant shall be afforded a new trial on armed robbery as well as murder. See *People v. Scott* (1977), 69 Ill. 2d 85, 87-88, 370 N.E.2d 540, and *People v. Lilly* (1974), 56 Ill. 2d 493, 495-96, 309 N.E.2d 1, which allow us to pass upon the armed robbery conviction for which no sentence has been entered.

This matter is remanded for a new *Batson* hearing and for entry of a sentence upon defendant's conviction for armed robbery.

Remanded with directions.

RIZZI, J., and *WHITE, J., concur.

*Justice White participated in this Opinion prior to his retirement.

APPENDIX B

Unpublished Order Of The Illinois Supreme Court Denying Leave To Appeal In The Matter

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

February 5, 1992

Hon. Jack O'Malley
State's Attorney Cook Co., Crim. Appeals Div.
309 Richard J. Daley Center
Chicago, IL 60602

No. 72829—People State of Illinois, petitioner, v. Geoffrey Freeman, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1992.

APPENDIX C

Unpublished Supervisory Order Issued In This Matter By The Illinois Supreme Court Under The Title *People ex rel. Daley v. Moran*

SUPREME COURT OF ILLINOIS

FRIDAY, MAY 26, 1989

THE COURT MADE THE FOLLOWING ANNOUNCEMENT:

PEOPLE'S DOCKET

No. 67180—People ex rel. Richard M. Daley, State's Attorney of Cook County, etc., movant, v. Hon. Matthew J. Moran, Judge of the Circuit Court of Cook County, et al., respondents.

The motion of the movant for a supervisory order is allowed. In the exercise of this Court's supervisory authority, the Hon. Matthew J. Moran, Judge of the Circuit Court of Cook County, is ordered to vacate the order of June 13, 1988, entered in *People v. Geoffrey Freeman*, No. 81-C-1317, directing the prosecutors, during a hearing conducted pursuant to *Batson v. Kentucky* (1986), 476 U.S. 79, to be sworn and subject to questioning and cross examination concerning their use of peremptory challenges at defendant's trial. *People v. Young* (Feb. 22, 1989), No. 60190, rehearing denied May 26, 1989.

The order of July 14, 1988, staying the trial court proceedings in *People v. Geoffrey Freeman*, No. 81-C-1317, pending disposition of the motion for supervisory order is vacated.

APPENDIX D

Opinion Of The Appellate Court Of Illinois, First Judicial District, Issued In A Prior Appeal In The Matter And Published As *People v. Freeman*, 162 Ill. App. 3d 1080, 516 N.E.2d 440 (1st Dist. 1987)

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee, v.
GEOFFREY FREEMAN, Defendant-Appellant.

First District (3rd Division) No. 84-0743

Cause remanded.

Opinion filed October 21, 1987.

JUSTICE FREEMAN delivered the opinion of the court:

Defendant Geoffrey Freeman was charged by information with three counts of murder (Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(a)(1), (a)(2), (a)(3)), one count of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18-2), and other offenses. After a jury trial on the murder and armed robbery charges, defendant was convicted of both offenses. A death penalty sentencing hearing was held. The jury did not reach a unanimous verdict on the death penalty. The trial court thereafter sentenced defendant to natural life imprisonment. Defendant the filed a notice of appeal. The State Appellate Defender was appointed to represent defendant on appeal and has filed a brief on his behalf. Defendant has filed a *pro se* brief raising additional issues on appeal.

Defendant and his counsel raise the following contentions on appeal: (1) the "Witherspooning" of prospective

jurors during *voir dire* questioning resulted in the selection of a jury which failed to represent a fair cross-section of the community and which was biased in favor of the prosecution; (2) defendant was denied his right to an impartial jury drawn from a fair cross-section of the community where the State used its peremptory challenges to exclude black citizens solely on the basis of race; (3) Cook County, being a "home rule" unit, does not have the power to define and provide for the punishment of a felony; (4) the trial court erred in not granting defendant's motions to quash arrest and suppress evidence; (5) the trial court erred in not granting defendant's motion to dismiss the information; (6) the trial court erred in denying defendant's motion to waive his presence for a part of trial; (7) the trial court erred in denying defendant's motion to subpoena the employment records of certain police officers; (8) the testimony of Sylvia Allen was improperly given as a result of monetary compensation provided her by the prosecutor; (9) defendant suffered prejudice as a result of the prosecutor's excessive references, during opening and closing statements, concerning the deceased's family members, where such references were made solely to inflame the passion of the jury; (10) the trial court erred in not granting a mistrial based on pretrial publicity of the case; (11) the trial court erred in allowing a juror to remain on the jury after he was contacted by someone who claimed to represent the Cook County sheriff's office; (12) the trial court erred in allowing various instructions to be tendered to the jury over defendant's objections; (13) the trial court erred in denying defendant's motion to dismiss his attorney; (14) the trial court erred in failing to order that defendant be examined by a psychiatric expert; (15) the trial court erred in denying defendant's motion to dismiss and discharge,

where the State proceeded against defendant on a burglary charge solely as a means of securing a conviction to use in aggravation against defendant on the murder charge.

For the reasons stated below, we remand this matter with instructions to the trial court.

The evidence at trial indicated the following. On January 22, 1981, at about 5:30 p.m., the victim, 71-year-old Madeline Mullennix, was driving her automobile from Frankfort, Illinois, to her home in Blue Island, Illinois. A short time before, Madeline's two sons, Charles and Vernon, had purchased a house for their mother in Frankfort. Madeline was staining some kitchen cabinets at her new house just before leaving. Before she left the Frankfort house, Madeline told her son Charles, who was at the house with her, that she was going to stop for a sandwich at 147th and Kedzie on her way home.

The next day, Friday, January 23, Charles Mullennix attempted unsuccessfully to reach his mother on the telephone. He called a cousin who had a key to his mother's apartment in Blue Island. Charles and his cousin met, entered the apartment, and found that Madeline had not been home. Charles then called his brother and the Blue Island police. Charles and Vernon began looking for their mother and her car, a 1978 Ford Thunderbird. They took different routes between Frankfort and Blue Island and also looked in surrounding areas. They were unable to locate Madeline or the car on Friday or after continuing their search the next day.

On Sunday, January 25, Vernon resumed his search and saw his mother's car parked on Halsted Street in front of a grocery store. Vernon got the license plate number of the car and circled the block three times. After he cir-

cled the third time, the car was gone. At trial Vernon testified that he had not approached the car since he was on crutches and was afraid. The license plate number on the car, number ZT906, was not his mother's license number. Vernon went to the Calumet Park police station and reported the license number he saw on the car. The license plates were registered to Jack Burke, who lived at 124th and Perry. Vernon went to that location but did not see his mother's car.

On Monday, Vernon and Charles went to the Kensington police station, and agreed to meet a squad car at 124th and Perry. On the way there, the brothers found their mother's car parked at 123rd and Lafayette. They informed police. The brothers were certain the car was their mother's since it had a distinctive Swedish bumper sticker and a broken louver on it. The license-applied-for sticker on the front windshield had defendant's name on it. Madeline Mullennix' Blue Island sticker was no longer on the car. The police broke into the car and recovered an umbrella, a cane, some clothing, and a key chain. The umbrella and key chain belonged to Madeline. A vest was found with defendant's driver's license inside it. Additionally, a bullet was found in the armrest of the right front door, and another bullet was found under the right front seat. Police also found reddish stains which appeared to be blood on the right front lower portion of the door, on the right front seat, on the side of the seat, and on the carpeting between the door and the seat.

Police officers Murphy and Tracy had been instructed to go to 115th and Normal Street to meet defendant on the afternoon of January 26. When the officers arrived at that location, defendant approached them and said, "I'm Geoffrey Freeman. You're looking for me?" Defendant was arrested and read his *Miranda* rights, which defen-

dant indicated he understood. Defendant told Murphy he had purchased the car from a man for $2,500. The officers then drove defendant to 123rd and Lafayette. Murphy told defendant he thought defendant had lied about the car. Defendant admitted he lied, and then said, "Andrew Burke killed the old lady" who owned the car. Defendant told Murphy that Burke worked at the Secretary of State's office. Murphy went to that office and arrested Burke. Defendant also told Murphy where the murder weapon could be found. Murphy recovered the gun, which had two expended cartridges, and a holster from a duct in the basement of a house at 124th and Perry. Defendant thereafter directed police officers Darling and Tracy to Madeline Mullennix's body, which was located in a field at 134th and Maryland.

Darling spoke with defendant and told defendant that his story did not make sense. Defendant again admitted that he lied. Defendant then told police the following. Andrew Burke had picked up defendant in the Thunderbird on Thursday and they drove around for a while. Burke then drove to 134th and Maryland and pulled a woman out of the trunk. The woman was still alive then, and Burke dragged her into the bushes and shot her.

After defendant finished his account of the events, he was taken to the Fifth District police station. Later that day, Darling recovered from a house at 12415 South Stewart two license plates registered to Madeline Mullennix and a pair of blue jeans belonging to defendant. Defendant had been staying at the house on Stewart Street with Derrick Allen, who resided there.

On Monday, January 26, police officer McGuire and his partner picked up Andrew Burke at the Fifth District police station and went to Area 2 Violent Crimes, where

they placed Burke in an interview room. Defendant was in a separate interview room at the station. McGuire and his partner spoke with defendant in the interview room. They advised defendant of his *Miranda* rights. Defendant responded that he understood his rights and would talk with the officers. McGuire told defendant that he knew what defendant had told Officers Murphy and Darling. Defendant then told McGuire and his partner essentially the same story he had told the other officers.

After McGuire spoke with defendant, he went to the other room and interviewed Burke. McGuire then returned to the room where defendant was sitting and told defendant what Burke had told him, and asked again what had happened. Defendant told McGuire generally the same story he had told him before.

McGuire then called the State's Attorney's office. Assistant State's Attorney Farrell came to the police station and interviewed Burke. Farrell then spoke to defendant, after first advising him of his *Miranda* rights. Defendant stated that he understood his rights and would speak to Farrell. Defendant told the same story he had related before. Farrell told defendant that he did not believe him. Defendant responded that it was the truth.

Farrell then brought Burke into the room where defendant was being questioned. Burke told defendant the same story that Burke had told Farrell before. Farrell then spoke again to defendant, outside of the presence of Burke, and defendant indicated the following. Defendant had obtained the gun that was used to kill the victim, since he and Burke were going to steal a car. There were two shells in the gun. He and Burke were together in a car. Burke was driving and defendant was in the passenger seat. They saw Madeline Mullennix's car near a

restaurant and waited for her to drive away. They followed her to an area of a street that was relatively dark. Then Burke rammed the victim's car and feigned an accident in order to get her to stop the car so they could steal it. The victim did not stop immediately, but eventually she did.

Defendant got out of the car and approached the driver's side of the victim's car. He was talking to the victim when Burke came up to the car and pulled open the driver's-side door. Burke then instructed defendant to pull out the gun. The victim was holding on to the steering wheel. Burke pulled her left arm away. Mullennix then started blowing the horn with her right arm. Burke reached in and took hold of her right arm and pulled her body towards the car door. Burke told defendant to pull out the gun. Defendant took the gun out of his waistband and held it about waist high. Defendant stated that his body then "banged up" against the gun, and the gun discharged accidentally. The bullet struck the victim in the left side of the chest.

Defendant indicated that Burke then pushed Mullennix toward the passenger side of the car. Mullennix was still alive at that time. Burke told defendant to drive the victim's car, and to follow Burke, who was driving his own car. Defendant stated that he wanted to leave the victim and her car near a hospital that they had passed, since she was badly injured. Burke, however, told defendant to keep following him and defendant did so.

Defendant and Burke drove to 134th and Maryland. Burke then approached the car that defendant was driving and told defendant that they would leave the victim there. Burke handed defendant the gun and told defendant to shoot the victim again. Defendant told the police

that he knew he had only one bullet left in the gun at this time and that he intended to shoot the gun at the passenger window. Just as he was about to shoot the gun, Burke noticed that defendant intended to fire the gun out the window. Burke stated, "You have to kill her," and slapped defendant's right hand, causing the gun to discharge and the bullet to strike the victim in the head. Defendant and Burke then took the victim's body out of the car and put it in the vacant lot. Defendant stated that he wanted to have the stolen car taken to a "chop shop" and sold in parts. Burke, however, told defendant that it was not necessary to have the car cut up, since Burke would be able to secure registration from the Secretary of State's office to indicate defendant as the owner.

Defendant gave a statement relating these events to the assistant State's Attorney in the presence of a court reporter. At trial, the transcript of defendant's statement was read to the jury. It also was established at trial that the bullets that killed the victim were fired from a gun taken from the home of Roniad Tucker at 12415 South Stewart, where defendant had stayed for a couple of weeks prior to his arrest in January 1981. Two witnesses also testified at trial that they had seen defendant driving the victim's car between January 22 and 26, 1981. Additionally, Larry Anderson testified that defendant had called him within two weeks after defendant's arrest and asked Anderson to state, if asked, that defendant was with Anderson at Anderson's home on January 22, 1981.

During the course of the trial, the jury was taken to the area where Madeline Mullennix' body was found. At the close of the State's case, the defense declined to present any evidence. Defendant waived closing argument. The first two issues in this appeal are raised by the State Appellate Defender. Defendant in his supplemental *pro se* brief has raised the remaining issues.

I

Defendant initially asserts that the "Witherspooning" of prospective jurors during *voir dire* questioning resulted in the selection of a jury which failed to represent a fair cross-section of the community and which was biased in favor of the prosecution and therefore prone to convict. Defendant notes that prospective jurors were examined regarding their attitudes toward the death penalty, and as a result, nine jurors were excused for cause because of their attitudes against the death penalty.

Defendant asserts that under *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, a juror may not be excluded for cause simply because he or she is opposed to the death penalty, but exclusion for cause may occur only with respect to jurors who are so opposed to the death penalty that they make it "unmistakably clear" during *voir dire* that they would automatically vote against the death penalty without regard to the evidence that might be developed in the case before them, or who make it "unmistakably clear" during *voir dire* that their attitude toward the death penalty is so strong that they could not make an impartial decision on the question of the defendant's guilt. 391 U.S. 510, 522 n.21, 20 L. Ed. 2d 776, 785 n.21, 88 S. Ct. 1770, 1777 n.21.

Defendant also notes that the Eighth Circuit Court in *Grigsby v. Mabry* (8th Cir. 1985), 758 F.2d 226, held that "Witherspooning" prospective jurors violates a defendant's sixth amendment right to a fair and impartial jury and his fourteenth amendment right to due process of law. Defendant also references Justice Simon's dissent in *People v. Wright* (1985), 111 Ill. 2d 128, 170-79, *cert. denied* (1987), 479 U.S. 1101, 94 L. Ed. 2d 179, 107 S. Ct. 1327, which is in accord with the *Grigsby* holding.

Defendant asserts that those opposed to the death penalty are an identifiable and sizable portion of the community. Their "actual purposeful" exclusion by the use of challenges for cause and peremptory challenges, defendant asserts, denied him his right to a fair, representative jury and violated the principles of *Duncan v. Louisiana* (1968), 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444, and *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692. Therefore, defendant asserts, a reversal of his conviction is mandated.

The State responds that defendant waived this issue on appeal. Since defendant withdrew his written motion to preclude the "Witherspooning" of prospective jurors, he failed to object to the qualification process. Additionally, defendant failed to raise this issue in his post-trial motion. (*People v. Pickett* (1973), 54 Ill. 2d 280.) Further, the State contends, six potential jurors were excused for cause by the trial court as a result of their answers to "reverse-*Witherspoon*" questions. The State contends that the defendant cannot now complain of any alleged error, since he was able to exclude for cause potential jurors who automatically would vote for the death penalty if defendant was found guilty.

In any event, the State asserts, the qualification of prospective jurors in this case was done pursuant to the standards set forth in *Witherspoon*. Additionally, the State notes that the *Witherspoon* holding applies to sentences only, and that the qualification of a jury pursuant to *Witherspoon* does not affect the validity of a conviction. (*Witherspoon v. Illinois* (1968), 391 U.S. 510, 518, 20 L. Ed. 2d 776, 782, 88 S. Ct. 1770, 1775; *Wainwright v. Witt* (1985), 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844; *People v. Wright* (1974), 56 Ill. 2d 523, 535-36.) Therefore, even if there were error, defendant's conviction cannot be reversed based on *Witherspoon*.

Further, the State asserts, the United States Supreme Court and Illinois Supreme Court have held that qualification of jurors under *Witherspoon* does not deny a defendant the right to a jury drawn from a fair cross-section of the community. (*Lockhart v. McCree* (1986), 476 U.S. 162, 90 L. Ed. 2d 137, 147-48, 106 S. Ct. 1758, 1766; *People v. Free* (1983), 94 Ill. 2d 378, 401, *cert. denied* (1983), 464 U.S. 865, 78 L. Ed. 2d 175, 104 S. Ct. 200.) The State also contends that defendant's argument that jurors unable to follow the law due to their beliefs concerning capital punishment are a constitutionally cognizable group for purposes of the "fair cross-section" requirement of *Taylor v. Louisiana* (1975), 419 U.S. 522, 528, 42 L. Ed. 2d 690, 697, 95 S. Ct. 692, 696-97, was squarely rejected by the United States Supreme Court in *Lockett v. Ohio* (1978), 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954. The Illinois Supreme Court adopted the *Lockett* holding in *People v. Free*. Additionally, the contention that *Witherspoon* qualification results in a "conviction-prone" jury similarly has been rejected. *Wainwright v. Witt* (1985), 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844; *People v. Morgan* (1986), 112 Ill. 2d 111, 139, *cert. denied* (1987), 479 U.S. 1101, 94 L. Ed. 2d 180, 107 S. Ct. 1329.

Further, the State correctly asserts that defendant's reliance on *Grigsby v. Mabry* (8th Cir. 1985), 758 F.2d 226, is misplaced, since the *Grigsby* decision recently was reversed by the Supreme Court in *Lockhart v. McCree* (1986), 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758. *McCree* specifically rejected the argument that a "death-qualified" jury is not impartial based on the absence of "*Witherspoon*-excludables" slanting the jury in favor of conviction. 476 U.S. 162, 173, 90 L. Ed.2d 137, 147, 106 S. Ct. 1758, 1764.

We hold that as defendant failed to raise this issue in his post-trial motion, the issue has been waived. However, even assuming the issue is reviewable, we hold that there was no error or constitutional violation. Defendant does not deny that a *voir dire* examination of potential jurors was conducted in accordance with *Witherspoon*, but argues that qualifying the jury in compliance with *Witherspoon* rules resulted in a conviction-prone jury, and that the effect of the *Witherspoon* holding denied defendant his constitutional rights. We note that *Witherspoon* does not set forth a standard as strict as the instant defendant asserts. In *Wainwright v. Witt* (1985), 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844, the Supreme Court rejected the requirement, which had been set forth in a footnote in *Witherspoon* and extensively relied on in various cases, that a juror's bias be proved with "unmistakable clarity." The Supreme Court stated that the proper standard, rather, is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52, 105 S. Ct. 844, 852, quoting *Adams v. Texas* (1980), 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521.

The trial court in the instant case questioned prospective jurors regarding, *inter alia*, (1) whether they could consider the death penalty among other possible penalties; (2) whether their attitudes toward the death penalty would influence their determination of defendant's guilt or innocence; and (3) whether they would vote automatically for or against the death penalty, no matter what the facts of the case were. The trial court did utilize the question of whether prospective jurors would "automatically" vote for or against the death penalty, a form of question that the Supreme Court has found may often be too rigid

(*Wainwright v. Witt* (1985), 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844). A review of the record, however, indicates that the court went beyond that question where necessary to determine if a potential juror would be impartial in applying the law. For instance, the court asked jurors if they would apply the law as it was tendered to them by the court, regardless of their personal feelings or attitudes.

We find no error by the trial judge in the instant case. Deference must be paid to the trial judge, who sees and hears the juror. (*Wainwright v. Witt* (1985), 469 U.S. 412, 426, 83 L. Ed. 2d 841, 852-83, 105 S. Ct. 844, 853; *People v. Free* (1983), 94 Ill. 2d 378, 403, *cert. denied* (1983), 464 U.S. 865, 78 L. Ed. 2d 175, 104 S. Ct. 200.) The trial court in this case properly and extensively questioned prospective jurors.

We also find that defendant's arguments that "Witherspooning" jurors resulted in a jury that failed to represent a fair cross-section of the community or to provide defendant a fair and representative jury or due process of law must fail. *Lockhart v. McCree* (1986), 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758; *People v. Morgan* (1986), 112 Ill. 2d 111, *cert. denied* (1987), 479 U.S. 1101, 94 L. Ed. 2d 180, 107 S. Ct. 1329.

II

Second, defendant asserts that the State exercised its peremptory challenges to exclude black citizens from the jury venire solely on the basis of race. Defendant asserts that the prosecutor's purposeful exclusion of blacks from the jury violated due process and equal protection and his right to an impartial jury drawn from a fair cross-section of the community.

The record indicates that during *voir dire* questioning, the prosecution exercised a total of 18 peremptory challenges. After the prosecution used its 17th challenge, the prosecution and defense accepted the 10th juror. The trial court then excused without objection the next five jurors for cause. After the fifth juror, Ms. Joan Isbell, was excused by the court for cause, defense moved to dismiss the remainder of the venire and to have a new venire called, on the basis that Ms. Isbell was the last black person in the venire. Defendant asserted that although there were two black accepted jurors (out of 10 accepted at the time), the prosecution did not intend for defendant to have a cross-section of the community represented on the jury. The prosecution responded that defendant failed to object when the two panels of prospective jurors initially were brought down for questioning. The trial court denied defendant's motion.

Defendant then moved for a mistrial based on the systematic exclusion of blacks from the jury. Defense counsel stated for the record that of the first 17 peremptory challenges exercised by the prosecution, 12 had been used to exclude black persons, and five to exclude white persons. The trial court denied defendant's motion for a mistrial, and jury selection continued. A new venire was called when there were no prospective jurors left in the previous venire. The prosecution exercised one more peremptory challenge against a person of unknown racial identity.

Defendant cites *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, and *People v. Wheeler* (Cal. 1978), 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890, for the proposition that a prosecutor's exercise of peremptory challenges to exclude blacks from a jury does not violate equal protection absent a showing that a pattern of such conduct existed in a number of cases. Defen-

dant contends that the *Swain* test has been met in view of the "many other" Cook County cases where similar racial practices have been used by the prosecution. Defendant also asserts that the record in the instant case demonstrates a constitutional violation, even if other cases in the jurisdiction are not considered, since the State refused to give any justifiable explanation for the exclusion of blacks from the venire despite defendant's objections.

The State responds that since defendant failed to raise this issue in his post-trial motion, he has waived it on appeal. (*People v. Pickett* (1973), 54 Ill. 2d 280.) Assuming the issue is reviewable, the State asserts, its use of peremptory challenges was proper. First, the State asserts, defendant has failed to bring sufficient evidence to show a constitutional violation in case after case as required by *Swain*.

The State also looks to *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712, which case was pending in the Supreme Court at the time the instant appeal was filed. The State correctly points out that *Batson* rejected the portion of *Swain v. Alabama* concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's use of peremptory challenges in case after case over a period of time. *Batson* held that a defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the petit jury by relying solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's own trial. (*Batson v. Kentucky* (1986), 476 U.S. 79, 96, 90 L. Ed. 2d 69, 87, 106 S. Ct. 1712, 1722-23.) Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The trial court then has the duty to deter-

mine if the defendant has established purposeful discrimination. (*Batson v. Kentucky* (1986), 476 U.S. 79, 97-98, 90 L. Ed. 2d 69, 88-89, 106 S. Ct. 1712, 1723-24.) While the State acknowledges the *Batson* holding, it nevertheless asserts that *Batson* should not apply retroactively to the instant case.

We note that at the time of defendant's trial, *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, and its progeny governed the issue of discriminatory use of peremptory challenges. After the conclusion of the instant defendant's trial and while this case was pending on direct appeal, the Supreme Court in *Batson* overruled *Swain*'s requirement of a showing of systematic exclusion of blacks from the venire. Later, in *Griffith v. Kentucky* (1987), 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708, the Supreme Court held that *Batson* applies to litigation pending on direct review when *Batson* was decided. As the instant case was pending when *Batson* was handed down, *Batson* applies to this case. Therefore, defendant's argument which relies on the *Swain* standard must fail.

The State contends that assuming *Batson* applies to the instant case, the record fails to demonstrate a *prima facie* case of discrimination, as the record is unclear as to the final jury composition. Further, although at least two of the first 10 selected jurors were black, the record fails to indicate which two jurors they were. The State asserts that a clear showing of the racial identities of the seated jurors and the excluded jurors is necessary to preserve this issue on appeal. Absent a complete record, the State contends, the issue is waived. *People v. Gaines* (1981), 88 Ill. 2d 342, 358-59, *cert. denied* (1982), 456 U.S. 1001, 73 L. Ed. 2d 1295, 102 S. Ct. 2285.

Even if the issue has not been waived, the State asserts, the record does not show that blacks were excluded from the jury solely because of race. On appeal the State notes that at least two jurors were black, and, more likely, there were probably three black jurors and one black alternate juror. That is, 25% of the jury was black, which is about the same percentage of Cook County residents 18 years and older who are black. Additionally, the record shows that several black prospective jurors were excused as a result of their answers to "*Witherspoon*"-type questions, or questions regarding whether they would follow the law even if they did not agree with it. Other black prospective jurors were excused because they had been arrested or charged with an offense. Additionally, the State contends that defendant's assertion that he has been denied his right to an impartial jury drawn from a cross-section of the community must fail, since the United States Supreme Court and Illinois Supreme Court consistently have declined to extend the fair—cross-section requirement of the sixth amendment to petit juries. *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712; *Lockhart v. McCree* (1986), 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758; *People v. Williams* (1983), 97 Ill. 2d 252, 278, *cert. denied* (1984), 466 U.S. 981, 80 L. Ed. 2d 836, 104 S. Ct. 2364.

We hold that defendant established a *prima facie* case of purposeful discrimination under *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. *Batson* held that a defendant may show a *prima facie* case of discrimination first by showing that he is a member of a cognizable racial group. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits discrimination. Third, the defendant must show that these facts and

any other relevant circumstances raise an inference that the prosecutor used his peremptory challenges to exclude veniremen from the petit jury on account of race. A pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of a discriminatory purpose.

Defendant in the instant case sufficiently raised an inference of purposeful discrimination. At trial defense counsel noted that defendant is black and that at least 12 of the 18 peremptory challenges used by the State were exercised against black persons. The prosecution, however, failed at trial to offer reasons for excluding blacks from the venire when challenged by defendant. Since the trial court denied defendant's motion for a mistrial without requiring the State to give a neutral explanation for excluding black prospective jurors, we remand this case with directions that the State be given the opportunity to come forward with a neutral explanation for the exclusion of the black prospective jurors. If the trial court decides that the State has come forward with a neutral explanation for the exercise of its peremptory challenges excluding the black prospective jurors, and the neutral explanation is sufficient to rebut defendant's *prima facie* case of purposeful racial discrimination, then defendant's conviction will stand. Defendant then may appeal any alleged error that is made in the trial court after the remandment. *People v. Sims* (1987), 154 Ill. App. 3d 528, 507 N.E.2d 178; *People v. Johnson* (1986), 148 Ill. App. 3d 163, 498 N.E.2d 816.

Finally, we acknowledge defendant's assertion that the United States Supreme Court in *Batson* expressly declined

to address the sixth amendment "fair cross-section" challenge to discriminatory use of peremptory challenges. Defendant notes in his reply brief that the Supreme Court has not expressly decided this issue under the sixth amendment. Defendant suggests, however, that this court decide the discrimination issue under the sixth amendment. We note, however, that in *Lockhart v. McCree* (1986), 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758, the Supreme Court stated that the fair—cross-section requirement under the sixth amendment has a limited scope, as "a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury." (476 U.S. 162, 174, 90 L. Ed. 2d 137, 148, 106 S. Ct. 1758, 1765.) We find, in any event, that defendant has failed to set forth any specific argument to show how the sixth amendment fair—cross-section requirement has been violated or to justify an extension of *Batson*.

III

Defendant's third contention, and the first contention raised in his *pro se* brief, is that Cook County, as a "home rule" unit, lacks the power to define and provide for the punishment of a felony. Defendant asserts that the Illinois Constitution defines Cook County as a home rule unit and as such, lacks the power to provide for the punishment of a felony. Ill. Const. 1970, art. VII, secs. 4, 6.

The State responds that there was no error, as the Illinois legislature, and not Cook County as a home rule unit, defines and provides for the punishment of a felony. (*People ex rel. Carey v. Chrastka* (1980), 83 Ill. 2d 67, 79.) The State asserts that defendant has misconceived the respective roles of the legislature and judiciary. *Roth v.*

Yackley (1979), 77 Ill. 2d 423; *People v. Williams* (1977), 66 Ill. 2d 179.

We agree with the State and find that defendant has misconstrued the law. There was no error committed.

IV

Next defendant contends that the trial court erred in failing to grant two pretrial motions. The first was a motion to quash arrest and suppress evidence, which defendant filed and argued *pro se*. Defendant asserts that the issues raised in this motion are reviewable as "plain error." (87 Ill. 2d R. 615(a).) Defendant also asserts that there was an unnecessary delay between his arrest and the time formal charges were brought against him. Ill. Rev. Stat. 1981, ch. 38, par. 109-1(a).

The second motion referenced by defendant was a motion to suppress statements given to police and to assistant State's Attorneys. Defendant asserts that the trial court erred in denying the motion since defendant was not present during argument on the motion. Further, defendant asserts that the trial court failed, due to the trial judge's allegedly deteriorating health, to properly review testimony at the hearing on the motion.

The State responds that defendant's assertions of error regarding the motions are waived, since he fails to support the assertions with argument or citation of authority. (87 Ill. 2d R. 341(e)(7).) Assuming *arguendo* that these issues are heard on appeal, the State contends, there was no error. First, the trial court properly denied the motion to quash arrest, as there was probable cause to arrest defendant. Further, the minimal delay in bringing defendant before a judge was reasonable. *People v. Cobb*

(1983), 97 Ill. 2d 465; *People v. Lippert* (1982), 89 Ill. 2d 171, *cert. denied* (1982), 459 U.S. 841, 74 L. Ed. 2d 85, 103 S. Ct. 92; *People v. Lucas* (1980), 88 Ill. App. 3d 942, 410 N.E.2d 1040.

Next, the State notes that at the hearing on defendant's motion to suppress certain statements, the trial court found that the statements were voluntary. Further, the trial court held that *Miranda* warnings were properly given at all necessary stages of the investigation and arrest and that defendant chose to speak voluntarily and freely. The trial court properly denied defendant's motion to suppress based on these findings. (*People v. Martin* (1984), 102 Ill. 2d 412, 425, *cert. denied* (1984), 469 U.S. 935, 83 L. Ed. 2d 270, 105 S. Ct. 334; *People v. Holloway* (1985), 131 Ill. App. 3d 290, 475 N.E.2d 915.) As the trial court's decisions are not contrary to the manifest weight of the evidence, the State contends, this court must not disturb the decisions. *People v. Davis* (1983), 95 Ill. 2d 1, *cert. denied* (1983), 464 U.S. 1001, 78 L. Ed. 2d 697, 104 S. Ct. 507.

Additionally, the State maintains that defendant's assertions concerning the trial judge's health and observations are wholly unsupported by the record and should be stricken as being clearly improper. Finally, the State asserts that defendant's contention that he was not present for the arguments on the motion to suppress and the court's ruling on the motion is contradicted by the supplemental record, which indicates that at the start of the proceedings on the motion, the court stated that all parties were present. *People v. Bonner* (1979), 68 Ill. App. 3d 424, 386 N.E.2d 366.

In reply defendant asserts that he invoked his right to counsel during custodial interrogation and had not waived

that right when he responded to police-initiated interrogation after again being advised of his rights. Defendant asserts that the use of his confessions viclated the fifth amendment. (*Edwards v. Arizona* (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1980.) Defendant also asserts that the police denied his requests to speak to his attorney.

Assuming that these issues are reviewable, we agree with the State and find that the trial court committed no error in denying defendant's motions to quash arrest and suppress statements, as the evidence supports the trial court's findings and indicates that defendant was present at the hearing. We also note that the record fails to support defendant's assertion that any alleged requests for counsel were improperly denied by the police. Additionally, defendant's assertion that the trial court failed properly to review the evidence is unsupported by the record.

V

Defendant also asserts that the trial court erred in failing to grant his motion to dismiss the information. Defendant contends that he was unlawfully charged by information and was denied his fifth amendment right to a grand jury indictment. Defendant also asserts that the information contains perjured statements by the prosecutor.

The State responds that defendant waived this issue by failing to support his allegation of error with any citation of authority or argument. (87 Ill. 2d R. 341(e)(7); *People v. Shaw* (1985), 133 Ill. App. 3d 391, 478 N.E.2d 1142.) Further, the State asserts that even if the issue has not been waived the trial court properly denied defendant's motion since the prosecution complied with the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, pars.

111-2, 111-3), and defendant has no right to be charged by indictment rather than information (*People v. Sievers* (1978), 56 Ill. App. 3d 880, 885, 372 N.E.2d 705, 708).

We find no merit in defendant's argument and hold that the trial court properly denied defendant's motion to dismiss. The State properly asserts that defendant has no right to be charged by indictment rather than information. (*People v. Sievers* (1978), 56 Ill. App. 3d 880, 372 N.E.2d 705.) Further, defendant's assertions that the information contained perjured statements is unsupported by the record, and, as these assertions lack legal authority, they are deemed waived. 87 Ill. 2d R. 341(e)(7).

VI

Next, defendant asserts that the trial court erred in denying his oral motion to waive his presence for closing arguments and the return of the verdict. Defendant also asserts that the trial court improperly failed to enter a sentence on the charge of armed robbery.

The State responds that defendant waived the issue of the trial court's ruling on his motion to waive his presence by failing to cite supporting authority or argument. (87 Ill. 2d R. 341(e)(7).) The State asserts that assuming *arguendo* the issue is not waived, the trial court's denial of the motion was proper since the record indicates that defendant had an active role in his defense at trial, and there is no evidence of prejudice. Therefore, any alleged error is harmless.

Further, the State acknowledges that the record shows the trial court failed to enter a sentence on the charge of armed robbery. While the jury found defendant guilty of both armed robbery and murder, the trial court imposed a sentence only on the murder conviction. The State

asserts that the record is unclear as to the reason the court failed to impose a sentence for the armed robbery conviction. As the armed robbery offense is not a lesser included offense of the murder conviction, the State requests that this court remand this case to the trial court for the purpose of sentencing defendant on the armed robbery conviction.

We find that defendant waived the issue of the trial court's denial of his motion to waive his presence by failing to cite supporting authority (87 Ill. 2d R. 341(e)(7).) Further, we remand this case to the trial court with instructions that the court impose a sentence on defendant's armed robbery conviction. *People v. King* (1977), 66 Ill. 2d 551, *cert. denied* (1977), 434 U.S. 894, 54 L. Ed. 2d 181, 98 S. Ct. 273.

VII

Defendant also asserts that the trial court erred in denying his motion to subpoena the employment records of certain Chicago police officers. Defendant asserts that the error resulted in a denial of his sixth amendment right to cross-examine and his right to discovery.

The State responds that defendant has waived this issue by failing to cite authority in support of his assertion. (87 Ill. 2d R. 341(e)(7).) Assuming the issue is reviewable, the State asserts there was no error since defendant failed to establish that the records were material or relevant, and his assertion that the records might aid his defense amounted to a mere "fishing expedition."

We hold that the trial court properly denied the motion, as the relevancy of the records was not shown. The trial court has broad discretion in ruling on issues of relevancy and materiality. (*People v. Anderson* (1985), 134 Ill.

App. 3d 80, 479 N.E.2d 1164.) We find no abuse of that discretion here.

VIII

Defendant next asserts that the testimony of witness Sylvia Allen was given as a direct result of monetary compensation that Allen received from the prosecutor. Defendant asserts that he first learned of this unlawful action at the time of the hearing on his motion for a new trial.

The State responds that defendant has waived this issue by failing to support his assertion with proper authority or argument. (87 Ill. 2d R. 341(e)(7).) In any event, the State contends, there was no error since the evidence, including a sworn affidavit of the prosecutor, indicates that the witness did not receive monetary compensation for her testimony, but rather was given cab fare to go home when she was stranded at the Markham courthouse after a pretrial conference. Further, the State contends, there is no evidence that the money for the cab fare influenced her testimony in any manner.

We agree with the State and find that defendant's allegations are not supported by the evidence. There was no error by the trial court.

IX

Defendant also contends that the prosecutor, in opening and closing statements to the jury, made excessive references to the victim's family members, solely to inflame the passions of the jury, resulting in prejudice to defendant.

The State responds that defendant waived this issue by failing to object at trial and failing to raise it in his post-

trial motion. Assuming this issue has been preserved, the State asserts, there was no harmful error. The State contends that the testimony of the victim's sons was relevant and admissible and argument by the prosecutor was proper. The children played an active role in the investigation of their mother's disappearance, and one son was called to testify in part as to the life and death of the victim. Further, there was no undue emphasis of the fact that the victim left a family surviving. The prosecutor's comments during opening and closing statements to the jury were properly limited to the investigation of the whereabouts of the victim and her car.

We find that defendant waived this issue by failing to object at trial. (*People v. Pallardy* (1981), 93 Ill. App. 3d 725, 417 N.E.2d 851.) However, even assuming the issue was preserved, we find no error, as the testimony of the children and comments by the prosecutor were properly limited in scope. *People v. Bartall* (1983), 98 Ill. 2d 294.

X

Defendant also asserts that the trial court erred in not granting a mistrial based on overwhelming pretrial publicity.

The State responds that defendant waived this issue by failing to support his assertion with proper authority or argument. (87 Ill. 2d R. 341(e)(7).) In any event, the State asserts, the trial court properly denied defendant's motion for a mistrial since the record demonstrates that the court repeatedly admonished the jury regarding the necessity of refraining from reading about the trial or watching anything about it on television, and since the jurors indicated to the court that they had not seen or read any media coverage of the trial.

We hold that the trial court properly denied defendant's motion, as defendant failed to bring evidence to show that the jury was exposed to or improperly influenced by media coverage of the investigation or trial of this matter. *People v. Henderson* (1976), 39 Ill. App. 3d 502, 348 N.E.2d 854.

XI

Next, defendant contends that the trial court erred in allowing a juror to remain on the jury after he was contacted by a person alleging to represent the Cook County sheriff's office, who apparently questioned the juror regarding the trial. Defendant also asserts that the trial court improperly failed to determine what was conveyed to the juror.

The State responds that defendant waived this issue by failing to object at trial, failing to raise it in his post-trial motion, and failing to support his assertion with proper authority or argument. (87 Ill. 2d R. 341(e)(7).) Assuming the issue is reviewable, the State contends, the trial court properly allowed the juror to remain on the jury since the juror notified the court of the incident, since the caller did not say anything harmful or intimidating, and since the court determined that the juror could still be fair and impartial.

We find that defendant has waived this issue by failing to raise it in his post-trial motion. (*People v. Pallardy* (1981), 93 Ill. App. 3d 725, 417 N.E.2d 851.) We hold that even if defendant preserved this issue for appeal, the trial court acted properly in questioning the juror and determining that the juror could continue objectively to serve on the jury even after receiving the call. There was no error.

XII

Defendant also asserts that the trial court erred in allowing various instructions to go to the jury over his objection.

In response the State acknowledges that the trial court gave two instructions over defendant's objections. One instruction concerned the law of accountability, and the second was regarding the felony murder doctrine. The State contends, however, that defendant waived his objections to the jury instructions by failing to raise them in his post-trial motion and by failing to support his assertions with proper authority or argument. (87 Ill. 2d R. 341(e)(7).) Assuming *arguendo* the issue is reviewable, the State contends, the jury instructions were properly given, as they were supported by the evidence.

We find that defendant has waived this issue, as he has failed even to specify which instructions were objectionable (*People v. Tannenbaum* (1980), 82 Ill. 2d 177), and fails to cite authority in support of his assertions (87 Ill. 2d R. 341(e)(7)).

XIII

Defendant also asserts that the trial court erred in denying his motion to dismiss his attorney. Defendant asserts that his attorney acknowledged that he was unable to represent defendant to the best of his ability. Defendant asserts he has been denied effective representation.

The State responds that there was no error. The State notes that the trial court initially allowed defendant to proceed *pro se* with his defense, with "standby" counsel. Defendant later withdrew his motion to appear *pro se* and asked the court to appoint his trial counsel to represent

him again, and counsel indicated to the court that he was capable of representing defendant in a professional manner. The State notes that counsel was defendant's fifth appointed counsel, and that defendant had moved at various times prior to trial to dismiss all of his other attorneys.

We find no error in the trial court's denial of defendant's motion to dismiss his attorney. *People v. Gornick* (1982), 107 Ill. App. 3d 505, 437 N.E.2d 892.

XIV

Defendant next contends that the trial court erred in not ordering him to be examined by a psychiatric expert prior to sentencing to determine his competency and fitness to proceed.

The State responds that there was no error since the trial court extensively questioned defendant and determined that he was able to cooperate with his attorney and understood the nature of the proceedings. Further, the State contends, no *bona fide* doubt of defendant's fitness was raised. The State asserts that the granting of a psychiatric examination is within the discretion of the trial judge, and there was no abuse of discretion here. *People v. Dominique* (1980), 86 Ill. App. 3d 794, 408 N.E.2d 280.

We agree with the State and find no abuse of discretion.

XV

Finally, defendant contends that the trial court erred in denying his motion to dismiss and discharge the murder prosecution. Defendant contends that the prosecutor proceeded against him on a burglary charge solely as a means

of securing a conviction against him to use in aggravation on the murder charge. Additionally, defendant asserts that he was not charged on the murder count within 160 days of the burglary prosecution, as is required by section 103-5(e) of the Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, par. 103-5(e)).

The State responds that defendant waived this issue by failing to cite supporting authority or argument. (87 Ill. 2d R. 341(e)(7).) In any event, the State asserts, the record reveals that defendant was arrested on the burglary charge several months before his arrest on the murder charge and that the prosecution merely proceeded against defendant in the order in which he was charged. The State contends that the trial court properly denied defendant's motion.

Defendant waived this issue by failing to include it in his post-trial motion. We find, however, that even if this issue has not been waived, the record does not support defendant's assertions and there was no error.

As stated hereinabove, this matter is remanded to the trial court with instructions that a hearing be held at which the trial court allows the State to come forward with a neutral explanation for its exercise of peremptory challenges against blacks from the jury venire and, additionally, for sentencing on defendant's armed robbery conviction if the trial court determines that the State has come forward with a sufficient neutral explanation.

Remanded with instructions to the trial court.

WHITE, J., concurs.

JUSTICE RIZZI, specially concurring:

I agree with the result reached by the majority. However, I do not agree with the majority's statements or conclusions regarding the sixth amendment challenge to the State's systematic exclusion of blacks from the jury. In my opinion, a defendant's right to an impartial jury under the sixth amendment gives him a constitutional entitlement to a jury drawn from a fair cross-section of the community. Therefore, I believe that the State may not at any stage of the jury selection process affirmatively frustrate this entitlement by systematically excluding cognizable racial groups from the jury in any case solely because of their race.

APPENDIX E

Defendant Geoffrey Freeman's Request For Production Of Documents

[Dated April 6, 1992]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

GEOFFREY FREEMAN,

Defendant.

Indictment No. 81 C 001317
Hon. Matthew J. Moran

DEFENDANT GEOFFREY FREEMAN'S REQUEST FOR PRODUCTION OF DOCUMENTS

Defendant Geoffrey Freeman, by his attorneys, requests that The People of the State of Illinois produce the following documents for inspection and copying at the offices of Jenner & Block, One IBM Plaza, Chicago, Illinois, within thirty days:

INSTRUCTIONS

1. If you previously had in your possession documents responsive to this request, but no longer have such documents, state in writing the present location of such documents and the identity of the person or entity that possesses

them. If any documents were destroyed, state the date, location, identity of the person disposing of them, and provide a description.

2. All documents withheld from production for any reason must be listed by date, author, recipient, cc.'s, and a description of the subject matter.

DOCUMENTS REQUESTED

1. All notes taken by Raymond Garza or Frank Nowicki, or anyone acting on their behalf, during the jury selection for the criminal trial of Geoffrey Freeman, conducted in January 1984 before the Hon. Richard J. Petrarca of the Circuit Court of Cook County.

2. All notes taken by Raymond Garza or Frank Nowicki, or anyone acting on their behalf, during the criminal trial of Geoffrey Freeman, that relate to Mr. Garza's or Mr. Nowicki's assessment of potential or actual jurors.

3. All memoranda, documents, or other materials reviewed and/or relied on by Raymond Garza or Frank Nowicki during jury selection in the criminal trial of Geoffrey Freeman.

4. All documents circulated by or within the Office of the State's Attorney, or any of its present or former members, that discuss jury selection or the use of peremptory challenges, or any formal or informal policies, rules, or procedures of the Office of the State's Attorney with respect to jury selection or the use of peremptory challenges.

5. All documents circulated by or within the Office of the State's Attorney, among any of its present or former members, that refer to the *Batson* decision or that refer

to any post-*Batson* decisions relating to jury selection or the use of preemptory challenges.

6. All documents relating to Raymond Garza's and/or Frank Nowicki's preparation for, or participation in, the *Batson* hearing previously conducted by Judge Moran in this case in July and August 1989.

7. All documents relating to the five criminal cases tried before a jury by Raymond Garza immediately prior to the 1984 criminal trial of Geoffrey Freeman, and the five criminal cases tried before a jury by Raymond Garza immediately after the *Freeman* case, which disclose:

a. The full case name and case number;
b. The dates on which the trial began and concluded;
c. The name of the judge assigned to the case;
d. The name, address, and business telephone number of the attorney or attorney representing the defendant or defendants in each case;
e. The final resolution of the case;
f. The number of blacks serving as jury members; and
g. The number of blacks serving as jury alternates.

8. All documents relating to the five criminal cases tried before a jury by Frank Nowicki immediately prior to the *Freeman* case, and the five criminal cases tried before a jury by Frank Nowicki immediately after the *Freeman* case, which disclose:

a. The full case name and case number;
b. The dates on which the trial began and concluded;
c. The name of the judge assigned to the case;

d. The name, address, and business telephone number of the attorney or attorneys representing the defendant or defendants in each case;
e. The final resolution of the case;
f. The number of blacks serving as jury members; and
g. The number of blacks serving as jury alternates.

9. All documents which disclose any case tried by Raymond Garza, or by Frank Nowicki, in which a conviction was reversed by an appellate court, including;

a. The full case name and appellate court number;
b. The dates on which the trial began and concluded;
c. The name of the trial judge assigned to the case;
d. The name of the attorney or attorneys representing the defendant or defendants in any such case.

10. All documents which identify any instances of improper conduct by Raymond Garza while employed by the Office of the State's Attorney. This includes, but is not limited to:

a. Any instance where Raymond Garza was found to have violated, or was charged with a violation of, any United States or Illinois law;
b. Any instance where Raymond Garza was found to have violated any Federal Court or Illinois Court Rule;
c. Any instance where Raymond Garza was charged with a violation of any disciplinary rule or any other attorney ethics provision, or was in any way subject to discipline or investigation by

the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois;

d. Any instances where Raymond Garza was found to have violated any rule, procedure, policy, or practice of the Office of the State's Attorney of Cook County;

e. Any instances where Raymond Garza received an unfavorable change in employment status, including but not limited to a decrease in salary, a change in job title, or a termination of employment, as a result of his conduct as a member of the Office of the State's Attorney; and

f. Any instances where Raymond Garza received a formal or informal reprimand from another member of the Office of the State's Attorney.

11. All documents which identify any instances of improper conduct by Frank Nowicki while employed by the Office of the State's Attorney. This includes, but is not limited to:

a. Any instance where Frank Nowicki was found to have violated, or was charged with a violation of, any United States or Illinois law;

b. Any instance where Frank Nowicki was found to have violated any Federal Court or Illinois Court Rule;

c. Any instance where Frank Nowicki was charged with a violation of any disciplinary rule or any other attorney ethics provision, or was in any way subject to discipline or investigation by the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois;

d. Any instance where Frank Nowicki was found to have violated any rule, procedure, policy, or

practice of the Office of the State's Attorney of Cook County;

e. Any instance where Frank Nowicki received an unfavorable change in employment status, including but not limited to a decrease in salary, a change in job title, or a termination of employment, as a result of his conduct as a member of the Office of the State's Attorney; and

f. Any instance where Frank Nowicki received a formal or informal reprimand from another member of the Office of the State's Attorney.

12. All summary documents that relate to or describe the race of venirepersons against whom the State exercised peremptory challenges, and the race of venirepersons whom the State accepted, for the period of 1983 to the present.

GEOFFREY FREEMAN

By: GLENN HEILIZER
One of his attorneys

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Dated: April 6, 1992

ORIGINAL

NO. 91-1754

Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ILLINOIS,

Petitioner,

v.

GEOFFREY FREEMAN,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Third Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the State's petition should be denied because the State seeks review of a decision that does not involve federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a).

2. Whether the State waived any right to seek review by writ of certiorari because it did not present any issue to the Illinois Supreme Court involving federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a).

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JURISDICTION

Because the State's petition seeks review of a state court decision that is not based on federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a), this Court has no jurisdiction to consider the petition.

STATEMENT OF THE CASE

On October 9, 1991, the Illinois Appellate Court ordered a new Batson hearing for the respondent, Geoffrey Freeman, and provided certain guidelines to be followed at the new hearing. (The Illinois Appellate Court's decision is in Appendix A of the State's petition for writ of certiorari.) First, the appellate court directed the trial judge at the new Batson hearing to "weigh the credibility of the prosecutor," and to "make a sincere and reasoned attempt to evaluate the State's explanations." Id. at 5a. Second, the appellate court allowed Mr. Freeman to obtain State-held documents relating to Mr. Freeman's case and to jury selection issues, because such materials would "assist in leading to a just result in ensuring that [Mr. Freeman] had a fair trial by a jury appropriately selected." Id. at 7a. Finally, the appellate court observed that the judge conducting the Batson hearing was not the same judge who presided at trial, and found that the testimony of excluded jurors could be "helpful in determining whether the State's race-neutral explanations are pretextual." Id. at 1a, 8a, 9a. The appellate court based its decision on other state

law decisions and on the facts of the case -- not on any federal constitutional law or federal statute or treaty.

The State did not object to the appellate court's order for a new Batson hearing, but petitioned the Illinois Supreme Court to review the portion of the appellate court's order allowing limited discovery and rebuttal witnesses. The Illinois Supreme Court denied the State's petition. (Copies of the State's petition for leave to appeal to the Illinois Supreme Court, and the order denying the petition, are in the attached Appendix.) In its petition the State contended that the appellate court's decision to allow limited discovery and rebuttal testimony were "without authority," "contrary to Illinois law," that "Batson itself imposes no such requirement," and that the procedures would "delay and lengthen" Illinois' "trial system." Appendix at 10a-18a. The State did not argue that the appellate court's ruling violated any federal constitutional law or federal statute or treaty.[1/]

[1/] The State's Statement of the Case on its face violates Sup. Ct. R. 12(h), which requires the State to "specify the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

REASONS FOR DENYING THE WRIT

The State's petition for writ of certiorari should be denied for at least two basic reasons.

First, the petition should be denied because the State seeks review of a decision that is not based on federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a). The State does not contest the appellate court's decision to give Mr. Freeman a new Batson hearing. Rather, the State disputes only the appellate court's decision to allow limited discovery and rebuttal testimony in connection with the new hearing. That decision, made by an Illinois state court based on the specific facts before it, does not implicate any federal constitutional law or federal statute or treaty, and therefore should not be reviewed on a writ of certiorari.

In Batson v. Kentucky, 476 U.S. 79 (1984), this Court applied the Equal Protection Clause to prohibit states from excluding prospective jurors based on race. This Court in Batson held that if the defendant makes a prima facie showing of discrimination in the selection of the jury, the state must provide explanations for excluding prospective jurors that are race-neutral and credible. Id. at 96-100. Regarding the procedures for deciding whether the explanations are neutral and credible, however, this Court deferred to the "variety of jury selection practices followed in our state and federal trial courts" and specifically directed trial courts to use their own procedures to evaluate the state's explanations:

> We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges [of prospective jurors].
>
> ....
>
> In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how to best to implement our holding today."

Id. at 99 and at 99 n.24.

Under this Court's plain language in Batson, the appellate court's decision to allow discovery and rebuttal testimony at Mr. Freeman's new Batson hearing is a discretionary "jury selection practice" -- not a procedure governed by the Equal Protection Clause as the State suggests. Because the appellate court's decision is not based on federal constitutional law or any federal statute or treaty, it should not be reviewed by writ of certiorari. Cf. Jones v. Jones, 938 F.2d 838, 843-44 (8th Cir. 1991) ("[t]his language [from Batson] requires reviewing federal courts to respect state court procedures for treating Batson challenges").[2/]

[2/] The facts here demonstrate precisely why it is appropriate to allow courts to fashion particular procedures for Batson hearings in particular cases. In Mr. Freeman's case, the State offered no contemporaneous reasons for its repeated exclusion of African Americans from the jury, the original trial judge had died during the appeal, and a new judge was assigned to conduct the Batson hearing. The new judge never had the opportunity to observe the excluded jurors first hand, and therefore could not assess the veracity of the State's numerous demeanor-based reasons for excluding African Americans from the jury. Cf. Batson, 476 U.S. at 98 n.21 ("the trial judge's findings . . . largely will turn on evaluation of credibility"). Contrary to the State's assertion that the appellate court required a "full scale trial" (petition at i, 4, 7), the court ordered limited safeguards to help ensure a fair hearing.

Second, even if there could be a federal constitutional issue involved in this case, the State waived any opportunity to present a federal challenge to the procedures ordered by the Illinois Appellate Court, because the State never presented such an issue to the Illinois Supreme Court (or to the Illinois Appellate Court). Under 28 U.S.C. § 1257(a), a party may only seek review of issues presented to "the highest court of a State in which a decision could be had." Although the State filed a petition for leave to appeal to the Illinois Supreme Court, and objected to the appellate court's opinion, the State never argued that the opinion violated the federal constitution or any federal law or treaty. Thus, the State failed to raise any issue that properly is reviewable by this Court on a writ of certiorari.

CONCLUSION

For each of the above reasons, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

PETITION FOR LEAVE TO APPEAL
AND ORDER DENYING PETITION

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Petitioner, vs. GEOFFREY FREEMAN, Defendant-Respondent.	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, Third Division, Appellate Court Nos. 89-2414 & 89-2500 (consolidated) There Heard on Appeal from the Circuit Court of Cook County, Criminal Division. Honorable MATTHEW J. MORAN Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Petitioner, vs. GEOFFREY FREEMAN, Defendant-Respondent.	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, Third Division, Appellate Court Nos. 89-2414 & 89-2500 (consolidated) There Heard on Appeal from the Circuit Court of Cook County, Criminal Division. Honorable MATTHEW J. MORAN Judge Presiding.

I.

PRAYER FOR LEAVE TO APPEAL

Pursuant to the provisions of Supreme Court Rule 315, Ill. Rev. Stat. 1989, ch. 110A, sec. 315, the People of the State of Illinois seek leave to appeal to the Supreme Court of Illinois from a judgment entered in the above-entitled cause by the Appellate Court of Illinois, First District, Third Division.

The appellate court has erred in mandating the admission of testimony of excluded jurors in rebuttal to the prosecutor's race-neutral explanation at a Batson hearing where it cites no relevant authority for its mandate and indeed where it conflicts with a Third District Appellate Court decision, People v. Williams, 177 Ill. App. 3d 787, 532 N.E.2d 1044, 1047 (3d

Dist. 1988) and this Court's decision in People v. Young, 128 Ill. 2d 1, 538 N.E.2d 453, 460 (1989). In Williams, the court affirmed the lower court's similar denial of rebuttal testimony of an excluded juror to contradict the prosecutor's explanations. In Young, this Court indicated similar testimony presented by defendant and his counsel was not required when it affirmed the trial court's denial of the same. Moreover, the Batson decision itself, Batson v. Kentucky, 476 U.S. 79, 109 S.Ct. 1712, 1724 n.24 (1986), imposes no such requirement and certainly did not envision such a proceeding.

In fact, the appellate court's procedural directive regarding rebuttal testimony of excluded jurors has been required in no other jurisdiction in this country. In only one state, North Carolina, has a court required rebuttal testimony at a Batson hearing, and, in that instance, the nature of the testimony was not specified. Furthermore, only one additional state, Maryland, has had a factual scenario wherein the lower court allowed an expanded hearing with rebuttal testimony. The appellate court's decision in the instant case was made without benefit of citation or discussion of these arguable authorities for its position. The opinion does not explain how the proposed testimony could possibly be relevant. Further, this holding regarding the propriety of rebuttal testimony at a Batson hearing was made in the mistaken reliance on this Court's opinions in Young, supra, 538 N.E.2d at 460 and People v. Harris, 129 Ill. 2d 123, 244 N.E.2d 357, 381 (1989) wherein this Court referred to the propriety of a defendant "offering" evidence to rebut, meaning argument, not testimony. Indeed, in Young, as indicated above, this Court actually rejected the argument that a testimonial procedure is required. Young, 538 N.E.2d at 460.

Subjecting jurors to return to court and otherwise be questioned regarding background, mannerisms or quirks beyond the norm would cause undue embarrassment not to mention have a tremendous chilling effect on jury service.

Moreover, the appellate court erred in mandating discovery of the State's Attorney's manuals or policies of jury selection where such a procedure is certainly "trial-type" and well beyond the strictures of Batson and where it was made on only its own authority indicating it was not precluded by this Court's earlier supervisory order, and this Court's decision in People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107 (1989).

Furthermore, even assuming the hearing judge was confused by this Court's supervisory order regarding his discretion to implement procedures, it was, at best, incumbent upon the appellate court to remand only with directions clarifying that the judge did indeed have discretion as to these matters, leaving the actual procedural decisions to be implemented by the judge. By actually mandating the discovery and defense testimony, the appellate court has simply eliminated altogether the hearing judge's discretion as to the procedures, contravening Batson itself, Batson, 106 S.Ct. at 1724, n.24, and the overwhelming weight of authority following Batson establishing the judge's discretion. See e.g., Williams, supra, 532 N.E.2d at 1047, 1047; People v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987); People v. Davis, 809 F.2d 1194, 1202 N.4 (6th Cir. 1987) (Batson left up to the trial courts the determination of what role defendants were to play once the prosecutor gave his or her explanation). It is most troubling that, by its decision, the appellate court has fashioned a bright line inflexible rule which in effect turns what was intended to be a summary proceeding into a full-blown trial, a disruptive

result which this Court in Young was careful to avoid. Young, 538 N.E.2d at 459-60.

In sum, the appellate court has erred in mandating procedures including rebuttal testimony of excluded jurors and discovery of prosecution manuals of jury selection at a Batson hearing since the order conflicts with the Third District's Williams opinion and opinions of this Court, it ignores these decisions and those on point from other jurisdictions, it utterly fails to indicate how the testimony and discovery could possibly be relevant, and otherwise sweepingly removes all discretion from the trial courts on these matters. In short, this Court must intervene to establish which procedures are mandated as a matter of law and which are left to the discretion and implementation by the trial courts.

II.

HISTORY IN THE APPELLATE COURT

The judgment of the Appellate Court, First District, Third Division, was entered on October 9, 1991. On October 17, 1991, the People filed in the Appellate Court their Notice and Affidavit of Intent to Seek Leave to Appeal to the Supreme Court of Illinois. This filing was sufficient to stay the Appellate Court mandate under Supreme Court Rule 368(b). Ill. Rev. Stat. 1989, ch. 110A, §368(B).

III.

POINT RELIED UPON FOR REVERSAL

The appellate court, by directing a full-blown Batson hearing, wherein jurors are called to testify to rebut the prosecutor's race-neutral explanations and the People are required to answer discovery by producing documents pertaining to jury selection policies, has contravened the decisions of the Third District Appellate Court and this Court, and has exceeded the scope of Batson and the People fail to see how the testimony of jurors could possibly be relevant to the prosecutor's state of mind. Moreover, the Freeman II decision impermissibly strips the lower courts of discretion to fashion Batson hearing procedures and to determine the relevance of proffered evidence.

IV.

STATEMENT OF FACTS

On February 6, 1984, a jury found defendant guilty of the murder and armed robbery of 71 year old Madeline Mullenix. (Indictment No. 81 C 1317). (R. 2097-98)[1] Judge Richard Petrarca presided over the voir dire and trial, and entered judgment on the findings. The jury could not reach a unanimous verdict on the death penalty. (R. C2665) Judge Petrarca thereafter sentenced defendant to natural life imprisonment. (R. 2428)

On direct appeal to the Appellate Court, First District, Third Division, the court found defendant had established a prima facie case of purposeful discrimination, and remanded the cause "with directions that the State be given the opportunity to come forward with a neutral explanation for the exclusion of the black prospective jurors" (R. C3178); People v. Freeman, 162 Ill. App. 3d 1080, 516 N.E.2d 440, 449 (1st Dist. 1987)(Freeman I).

On remand, the cause appeared before the Honorable Matthew J. Moran, since Judge Petrarca had since died. (R. 2886, 2922) For purposes of the Batson hearing, Judge Moran ordered the trial prosecutors to give testimony under oath and be subject to cross-examination. (R. 2900-2901) In response, the People filed a Motion for Supervisory Order to this Court. (R. 2928) This Court allowed the motion and vacated the trial judge's order. (R. 2928)

At the second stage Batson hearing that ensued, one of the trial prosecutors articulated his reasons for excluding the jurors in question. (R.

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[1] Forty relevant pages of the appellate record have been incorrectly paginated. What should be pages 3000-3039 have been numbered 2930-69, causing confusion with the earlier transcript with the same numbers. The earlier, correctly numbered pages 2930-69 will be referred to as 2930A etc., and the erroneously marked pages will be marked 2930B etc.

2931-54) In response, counsel argued the prosecutor's explanations were not sufficient to overcome the prima facie case. (R. 2958-67A, 2983-99, 2930-60B) As part of his case defendant sought "to offer testimony as to the question of voir dire questioning and answering that occurred at Mr. Freeman's jury." (R. 2967A) The judge precluded the testimony concluding:

> I think that ... [testimony] would go beyond the scope of the Batson decision. Particularly, since the Appellate Court has already found there is prima facie evidence of discrimination in the exclusion of these jurors. The court will not permit excluded jurors to be called at this limited hearing. (R. 2967-68B)

The court also ruled regarding defendant's discovery request for "any policies or procedures of the State's Attorney[']s Office in regards to jury selection and the use of peremptory challenges." (R. 2965B) The court stated:

> The State's Attorney[']s Office in the Freeman case has refused to respond to this request and has offered no explanation to clarify their refusal. Under the directives of the supervisory order I have no authority to order response to this inquiry. (R. 2966B)

After hearing the above arguments from counsel, the judge ruled on the ultimate issue, holding the defense had failed to overcome the prosecutor's racially neutral explanations. (R. 2968B) As part of its ruling, however, the court stated the following:

> ...The Court does not find ... [the prosecutor's] explanations to be truthful since he refused to take an oath and to be subject to cross-examination . ..." (R. 2967B)
>
> * * *
>
> I cannot say in view of the restrictions imposed by the supervisory order whether or not I believe ... [the prosecutor]. But, he did state racially neutral explanations and the trial notes which I have inspected support his explanations. (R. 2968B)

On appeal, the appellate court remanded the instant case "for a new Batson hearing." People v. Freeman, ___ Ill. App. 3d ___, ___ N.E.2d ___ (Nos. 89-2417 & 89-2500, October 9, 1991)(Freeman II), slip op. at 11. The court concluded it was "unable to determine whether the hearing judge appropriately weighed the evidence in determining whether there was a Batson violation.". Id. slip op. at 6.[2] The court then issued its procedural "directions" Id., slip op. at 11, indicating 1) defendant was entitled to discovery of the State's Attorney's "training manuals or policies" Id., slip op. at 7, in order to show "a scheme or plan to limit the minority members of a jury..." Id., slip op. at 8; 2) "defendant shall be permitted to offer testimony of excluded jurors for the purpose of demonstrating that the State's race-neutral explanations are pre-textual." Id., slip op. at 10. It is from the court's order directing the above discovery and rebuttal testimonial procedures that the People now appeal.

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[2] Part of the appellate court's difficulty with understanding the nature of the hearing judge's ruling came from its own, Id., slip op. at 4, and defendant's (Deft. Br. 16, n.9), misreading of the judge's comments. The judge's remark that "the record does not contain a reasonable explanation for the use of at least four of the [State's] peremptory challenges..." (R. 2963B) was not, as suggested, made as part of his ruling referring to the prosecutor's explanations at the hearing but rather was referring to the earlier voir dire record which the appellate court had reviewed in Freeman I.

V.

ARGUMENT

THE APPELLATE COURT REMAND ORDER MANDATING DISCOVERY AND DEFENSE TESTIMONY TO CONTRADICT THE PROSECUTOR'S RACE-NEUTRAL EXPLANATION AT A BATSON HEARING WAS MADE WITHOUT AUTHORITY AND IS, IN FACT, CONTRARY TO ILLINOIS LAW. MOREOVER, BATSON ITSELF IMPOSES NO SUCH REQUIREMENT. FURTHERMORE, WITHOUT INTERVENTION OF THIS COURT, THE INFLEXIBLE PROCEDURAL FORMAT REQUIRED BY THE APPELLATE COURT WILL UNNECESSARILY DELAY AND LENGTHEN THE ALREADY OVERBURDENED TRIAL SYSTEM OF THIS STATE.

The appellate court's order remanding the instant cause for a new Batson hearing with the sweeping pronouncement that a defendant is entitled to present testimony of excluded jurors directly contravenes the decision of the Third District Appellate Court in People v. Williams, 177 Ill. App. 3d 787, 532 N.E.2d 1044, 1045-47 (3d Dist. 1988). In Williams, the defendant, in a strikingly similar argument, attempted to call a juror to indicate she did want to serve as a juror to contradict the prosecutor's explanation that he thought the juror did not want to serve. Id. at 1045, 1046. The Williams court framed the issue before it as whether defendant was "entitled to present rebuttal evidence at the Batson hearing?" Id. at 1045, and answered the question with a resounding "no." Id. at 1047. In so deciding, the court analyzed a number of federal cases which have dealt with Batson procedural questions. Id. at 1045-46. See e.g. United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987); People v. Tucker, 836 F.2d 334 (7th Cir. 1988); People v. Tindle, 860 F.2d 125 (4th Cir. 1988). The Williams court noted that the Batson hearing particulars are for the trial court to decide in each particular case and the discretion in fashioning such procedures is broad. Williams, 532 N.E.2d at 1046. The Williams court further noted the Thompson court's explanation of defense

counsel's two crucial functions at the adversary proceeding, both which refer to counsel's presentation of argument. Id. at 1046-47. The Williams court thereafter concluded that the trial court's denial of defense testimony did not constitute an abuse of discretion. Id. at 1047. The court noted though, that it was not concluding that defense testimony was totally prohibited. Id. The trial court also determined that the proffered defense testimony was not relevant because the prosecutor's subjective feelings could not be denied "except by evidence that the prosecutor had expressed feelings to the contrary." Id. at 1046.

The appellate court's decision also conflicts with this Court's opinion in People v. Young, 128 Ill. 2d 1, 538 N.E.2d 453 (1989). In Young, the defendant sought to admit his own testimony, as well as that of his co-defendant and his trial counsel, to indicate that, in their opinion, the juror in question did not hesitate in answering voir dire questions to rebut the prosecutor's explanation that the juror had hesitated. Young, 538 N.E.2d at 460. This Court held the trial court did not abuse discretion in denying the admission of the testimony. Id. See also People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107, 1116-17 (1989)(denial of defendant's proffered expert testimony regarding statistical analysis of peremptory challenges was proper where testimony was not relevant to the defense rebuttal stage of proceedings).

The People submit that the hearing judge's ruling prohibiting the testimony in the case at bar was likewise proper. First, as indicated in Williams, relying on a line of federal cases, a defendant at a Batson hearing, at best, is entitled to be present to hear the prosecutor's explanations and respond in argument to point out infirmities in the prosecutor's statement and make a record. Williams, 532 N.E.2d at 1046-47. And, although testimony may

in some instance be appropriate if it bears directly on the prosecutor's state of mind, a defendant is not entitled to it.

The trial court's determination in this case to exclude the testimony was certainly proper since it had little, if any, probative value. Although defendant did not make an offer of proof or otherwise establish his purpose in presenting the testimony at the hearing, it is clear from his brief on appeal that he wanted to dispute such matters as a juror's hesitation, as in Young, supra, or an inability to comprehend. (Deft. Br. 45)

As the Williams court stated, however, the juror's testimony could not serve any useful purpose in rebutting the prosecutor's explanation, unless it involved actually impeaching or contradicting the prosecutor's state of mind concerning his explanation for the challenge. Indeed, in another context, such opinion testimony was found to be irrelevant. See People v. Eshaya, 144 Ill. App. 3d 757, 494 N.E.2d 772, 778 (1st Dist. 1986)(an occurrence witness' state of mind is not telling of the defendant's subjective feelings to prove defendant's claim of self-defense). See also People v. Hooper, 118 Ill. 2d 244, 506 N.E.2d 1305, 1310 (1987)(Clark, J., dissenting)(emphasis in text)(defendant is not in a position to prove a venireman's demeanor did not justify the prosecutor's use of his peremptory challenges). In short, another person's perception or opinion of a demeanor-based explanation simply does not create an inference of pretext.

Defendant's complaint about the subjective nature of peremptory challenges is not novel. And, this Court has noted that demeanor explanations must be reviewed with caution. People v. Harris, 129 Ill. 2d 123, 544 N.E.2d 357, 380 (1989). This does not mean, however, that such explanations are not legitimate. See Young, 538 N.E.2d at 457; Mack, 538 N.E.2d at 1112. To the

contrary, Batson leaves room for a prosecutor to exercise challenges on "hunches" and past experience, so long as racial discrimination is not the motive. State v. Antwine, 743 S.W.2d 51, 65 (S.C.Mo. 1987). Indeed, challenges are a product of subjective analyses of a wide variety of character and personality traits perceived by counsel. See Id. at 66. And, although such traits may not be objectively provable, Batson unequivocally states that explanations need not rise to the level of cause. Id. at 65. See also People v. Cole, 54 Ill. 2d 401, 298 N.E.2d 705, 712 (1973)(determination of impartiality is not a purely objective determination). See also United States v. Roan Eagle, 867 F.2d 436, 442 (8th Cir. 1989)(if peremptory challenges are to continue, the prosecutor's privilege must be awarded substantial leeway).

The appellate court decision has exceeded its authority in mandating procedures where the Batson decision itself imposes no such requirement. In Batson, the court indicated that when a defendant timely objects to a prosecutor's peremptory challenge, the defendant is entitled to make out a prima facie case of purposeful discrimination and, once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. Batson v. Kentucky, 476 U.S. 79, 109 S.Ct. 1712, 1721 (1986). The trial court will then have the duty to determine if the defendant has established purposeful discrimination. Id. at 1723-24. In its decision, the Batson court specifically declined "to formulate particular procedures," Id. at 1724, indicating it was making "no attempt to instruct these [trial] courts how best to implement our holding today." Id. at 1724, n.24. As stated by the court in United States v. Davis, 809 F.2d 1194, 1202 n.4 (6th Cir. 1987), Batson did not fashion any procedural guidelines other than in the cases explaining the prima facie burden of proof rules (referring to Batson's

citation to several Title VII cases). See also Note, Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings, 99 Yale L.J. 187, 191 (1989). See further United States v. Wilson, 884 F.2d 1121, 1127 n.1 (8th Cir. 1989)(Beam, J., dissenting in a 7-6 en banc decision)(nothing in Batson states, or even infers, that a testimonial procedure to rebut an allegedly pretextual explanation is required or desirable.)

Certainly, the Batson court could not have envisioned the disruptive type of procedure which the appellate court has here required. See Young, 538 N.E.2d at 460, citing State v. Jackson, 368 S.E.2d 838, 842 (S.C.N.C. 1988)(the disruption to a trial overbears any good to be obtained by the prosecutor's sworn testimony). As this Court noted in Young, referring to Batson: "There was no suggestion by the court that there was to be what could amount to a trial within a trial." Id. at 459. And, as with the procedure of swearing the prosecutor and subjecting him or her to cross-examination, had the Batson court intended that the defense would be entitled to discovery and to present rebuttal testimony, "it would have been a simple thing for the court to have said so." Id. Certainly, the procedural matters defendant sought here are far more disruptive and imposing than the ones found unnecessary in Young and Jackson, above. Indeed, the People submit the hearing judge here properly exercised his discretion in prohibiting the rebuttal testimony, determining that Batson did not require the same, and indicating that only a limited hearing was warranted.

A mandate such as the appellate court's reversing a trial court's order and directing defense rebuttal testimony at a Batson hearing has occurred in only one other jurisdiction, North Carolina. In State v. Green, 376 S.E.2d 727, 728 (S.C.N.C. 1989), the trial court disallowed rebuttal evidence where

defendant presented an affidavit with names of people he would call. The Green court reversed, indicating defendant was entitled to present evidence tending to rebut the prosecutor's explanations. Id. Accord State v. Robinson, 1991 N.C. Lexis 666, *19 (S.C.N.C. October 3, 1991).

In contrast, as argued above, this Court has specifically declined to entitle defendant with a right to rebuttal testimony. See Young, supra, 538 N.E.2d at 460. The People submit the Young decision is better reasoned and more in line with the body of authority which indicate the procedural decisions are best left to the discretion of the trial court, see Argument, supra at 12-13. Although the above decisions have seemingly left open the door for the defense to present such rebuttal testimony, the People have found only one other jurisdiction, Maryland, where such testimony was actually allowed. See Chew v. State, 562 A.2d 1270, 1277 (S.C.Md 1989)(propriety of rebuttal testimony not specifically at issue, but defense counsel was permitted to testify in rebuttal at the remand).

Furthermore, standards of relevancy still obtain. In Green, it is unclear for what purpose the evidence was offered, whereas, here, it is clear defendant's proffered testimony had little, if any, probative value. Also, in Chew, defense counsel did apparently testify regarding a juror's demeanor stating that in his opinion the juror in question was not "unsmiling" as indicated by the prosecutor. The People submit that counsel's testimony in Chew was likewise irrelevant and the decision is against the weight of authority, see Argument, supra at 10, 11. At any rate, the appellate court did not in any way rely on these cases for support. It is interesting to note that the appellate court did not even discuss or attempt to distinguish the Third District's opinion in Williams, supra, which directly addresses this issue.

Even assuming the hearing judge was confused by this Court's supervisory order regarding his discretion as to procedural matters, it was, at best, incumbent upon the appellate court to remand with directions clarifying the judge did indeed have discretion as to these matters, leaving the actual procedural decisions up to the judge. Cf People v. Queen, 56 Ill. 2d 560, 565, 310 N.E.2d 166 (1974)(error when trial court refuses to exercise discretion in the erroneous belief it has no discretion as to the question presented). By mandating the defense testimony, the appellate court has altogether eliminated the judge's discretion as to the hearing's procedures, contravening Batson, 106 S.Ct. at 1724, n.24, and the weight of authority after Batson establishing the judge's discretion. See Williams, supra, 532 N.E.2d at 1046, 1047; People v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987). See also Williams v. State, 767 S.W.2d 872 (Ct.App.Tx 1989). In Williams, the court, sitting en banc, determined in a 7 to 6 decision that a defendant is entitled to present the testimony of witnesses, including the prosecutor, to establish his prima facie case. Id. at 874. One justice, in his dissent, disagreed with the elimination of the trial court's discretion, remarking the court was there imposing a procedure which no other court in the country had described. Id. at 878 (Enoch, J., dissenting)

Defendant's argument below that he was denied his opportunity to rebut the prosecutor's explanation citing this Court's Young decision (Deft. Br. 49), and United States v. Thompson, 827 F.2d 1254, 1258 (9th Cir. 1987) (Deft. Br. 47), is based on a misreading of those cases. In Young, this Court, citing three out of state cases, State v. Slappy, 522 So.2d 18 (S.C.Fla 1988), Ex Parte Branch, 526 So.2d 609 (S.C.Ala. 1987) and State v. Antwine, 743 S.W.2d 51 (S.C.Mo. 1987) stated the following:

> ...a defendant generally should be permitted to offer evidence to rebut the prosecution's explanations for the exercise of peremptory challenges... .Young, 538 N.E.2d at 460.

Defendant has interpreted the "offer evidence" language to mean the presentation of testimony when it is clear this phrase referred to the presentation of argument.

In each of the above cited cases, the court was concerned with rebuttal argument by the defense. See Slappy, 522 So.2d at 20; Branch, 526 So.2d at 624; Antwine, 743 S.W.2d at 65. This is likewise true of the Thompson case, cited by defendant. Thompson, 827 F.2d at 1258. And, in the case at bar, defendant was given ample opportunity to respond where he presented a lengthy and detailed rebuttal argument. (R. 2958-67A, 2983-99, 2930-33B, 2935-41B, 2943-47B, 2949-54B, 2959-60B)

Finally, the appellate court also erred in mandating discovery. The appellate court cites no affirmative authority, but rather says it is not precluded from imposing such a requirement because this Court did not prohibit it either in its earlier supervisory order or in People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107 (1989). First, the People maintain that Mack does preclude such discovery as a trial-type procedure. Mack, 538 N.E.2d at 1115. And, in People v. Hope, 137 Ill. App. 3d 430, 560 N.E.2d 849, 873-74 (1990), this Court specifically determined that discovery rules, Supreme Court Rule 412, Ill. Rev. Stat. 1987, ch. 110A, §412, do not apply to post-conviction Batson hearings. As argued above, even assuming such discovery is permissible, such a procedure is a discretionary matter for the trial court. Hence, the appellate court exceeded its authority in requiring discovery of any kind. The

People submit that such manuals or policies of the State's Attorney, if they exist, would constitute work-product and fall squarely within the protections of the work-product doctrine. See Mack, 538 N.E.2d at 1115, citing Ill. Rev. Stat. 1987, ch. 110A, §412(j)(i). Whatever materials are not work product would be devoid of relevance. See Shelton v. State, 521 So.2d 1035, 1038 (Ct. App.Ala Ala.App. 1987)(it is not the duty of the court to evaluate the prosecutor's subjective theory of jury selection). At any rate, as in Young, the disruption that would occur from such a discovery procedure overbears any good which could be obtained therefrom.

In sum, this Court must intervene in the instant matter to correct the appellate court's order directing a procedural format which conflicts with another district of this State and prior decisions of this Court. The court's sweeping order will otherwise cause havoc in the trial courts unnecessarily lengthening and delaying trial matters. The case at bar provides an opportunity for this Court to determine what Batson procedures are mandated as a matter of law and which should be left to the discretion and implementation by the trial court.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court grant their Petition for Leave to Appeal, reverse the decision of the Appellate Court wherein it remanded the cause with directions, and remand the matter to the trial court for the sole purpose of appropriately weighing the prosecutor's race-neutral explanations and direct the trial court to exercise its own discretion in determining the proper procedures at the hearing.

Respectfully submitted,

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72829

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No. 72829 - People State of Illinois, petitioner, v. Geoffrey Freeman, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1992.

91-1754

CERTIFICATE OF SERVICE

I, GLENN E. HEILIZER, an attorney, certify that I caused a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis to be served upon:

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by having true and correct copies thereof deposited in the U.S. Mail, in envelopes properly addressed and with sufficient postage affixed thereto, at One IBM Plaza, Chicago, IL, this 3rd day of June 1992. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Glenn Heilizer
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(3)

Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

No. 91-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ILLINOIS,

Petitioner,

vs.

GEOFFREY FREEMAN,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District, Third Division

REPLY BRIEF IN RESPONSE TO THE BRIEF IN OPPOSITION TO CERTIORARI

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THE ARGUMENT MADE IN THE PETITION FOR A WRIT OF CERTIORARI, TO THE EFFECT THAT THIS COURT'S *BATSON* DECISION DOES NOT REQUIRE AN EVIDENTIARY HEARING, WAS MADE REPEATEDLY AND EMPHATICALLY IN THE PETITION FOR LEAVE TO APPEAL FILED IN THE ILLINOIS SUPREME COURT.

Respondent asserts in his Brief in Opposition that the issue raised in the Petition for a Writ of Certiorari was never argued in the Illinois Supreme Court. (Brief in Opposition 5) That assertion is completely false. The Petition for a Writ of Certiorari raises the issue of whether this Court's *Batson* decision requires an evidentiary hearing with discovery and testimony under oath. That exact issue was repeatedly and emphatically raised in the Petition for Leave to Appeal filed in the Illinois Supreme Court by the State.

The following are some of the sentences in the Petition for Leave to Appeal (PLA) which raise that issue:

> "Moreover, the *Batson* decision itself, *Batson v. Kentucky*, 476 U.S. 79, 109 S. Ct. 1712, 1724 n. 24 (1986), imposes no such requirement and certainly did not envision such a proceeding." (PLA 2)

> "Moreover, the appellate court erred in mandating discovery of the State's Attorney's manuals or policies of jury selection where such a procedure is certainly 'trial-type' and well beyond the strictures of *Batson*. . . . (PLA 3)

> "By actually mandating the discovery and defense testimony, the appellate court has simply eliminated altogether the hearing judge's discretion as to the procedures, contravening *Batson* itself, *Batson*, 106 S. Ct. at 1724, n. 24, and the overwhelming weight of authority following *Batson* establishing the judge's discretion." (PLA 3)

> "The appellate court decision has exceeded its authority in mandating procedures where the *Batson* decision itself imposes no such requirement." (PLA 12)
>
> "Certainly, the *Batson* court could not have envisioned the disruptive type of procedure which the appellate court has here required." (PLA 13)
>
> "By mandating the defense testimony, the appellate court has altogether eliminated the judge's discretion as to the hearing's procedures, contravening *Batson*, 106 S. Ct. at 1724, n. 24, and the weight of authority after *Batson* establishing the judge's discretion." (PLA 15)
>
> "The case at bar provides an opportunity for this Court to determine what *Batson* procedures are mandated as a matter of law and which should be left to the discretion and implementation by the trial court." (PLA 17)

Therefore in the Illinois Supreme Court the State raised the same issue as in the Petition for a Writ of Certiorari. Moreover, by relying on the *Batson* case, which is a federal constitutional decision based on the Equal Protection Clause, the State made it clear that it was raising a federal constitutional issue in the Illinois Supreme Court. See *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990).

In addition, petitioner notes that the decision of the Appellate Court of Illinois in this case, requiring discovery and testimony under oath at a *Batson* hearing, has been followed in another decision of that court. *People v. Knott*, 224 Ill. App. 3d 236, 586 N.E.2d 479 (1st Dist. 1991), *leave to appeal granted* Ill. Sup. Ct. No. 73340, June 3, 1992.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, petitioner respectfully requests that a writ of certiorari issue to review the opinion and judgment of the Appellate Court of Illinois, First Judicial District.

Respectfully submitted,

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